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PROCEEDINGS AND ORDERS DATE: [02/11/92]

CASE NBR: [91105655] CSH STATUS: [DECIDED]
SHORT TITLE: [O'Dell, Joseph R.]
VERSUS [Thompson, Warden, et al.] DATE DOCKETED: [090391]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Sep 3 1991	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 20 1991		Brief of respondent Warden Thompson in opposition filed.
3	Sep 26 1991		DISTRIBUTED. October 11, 1991
6	Oct 15 1991		REDISTRIBUTED. October 18, 1991
8	Oct 28 1991		REDISTRIBUTED. November 1, 1991
10	Nov 4 1991		REDISTRIBUTED. November 8, 1991
12	Nov 12 1991		REDISTRIBUTED. November 15, 1991
14	Nov 21 1991		REDISTRIBUTED. November 27, 1991
16	Dec 2 1991		Petition DENIED. Statement by Justice Blackmun respecting the denial of certiorari with whom Justice Stevens and Justice O'Connor join. (Detached opinion.)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-5655

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

CHARLES E. THOMPSON, Warden
Mecklenberg Correctional Center,
Boydton, Virginia; EDWARD W. MURPHY,
Director, Virginia Department of Corrections;
MARY SUE TERRY, Attorney General of the
Commonwealth of Virginia; and the
COMMONWEALTH OF VIRGINIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

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September 3, 1991

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Questions Presented

1. Whether, under this Court's ruling in Gardner v. Florida, the failure to provide a capital defendant with the opportunity to rebut the prosecution's misleading statements to the jury suggesting that the defendant would be eligible for parole if sentenced to life renders the death sentence constitutionally unreliable?
2. Did the Virginia court's arbitrary application of its procedural bars violate defendant's Fourteenth Amendment right to due process of law?
3. Whether O'Dell's court-ordered psychiatric examination, which evaluated only his ability to stand trial and not his capacity to represent himself, violated the standard of Faretta v. California and further, whether Drope v. Missouri requires that a trial court order further psychological examination when a defendant proceeding pro se in a capital trial exhibits severe emotional disturbance?
4. Did the state court's dismissal of O'Dell's discretionary state habeas appeal rest on a sufficiently independent or adequate state ground?

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OPINIONS BELOW

The Orders of the Circuit Court of Virginia Beach dismissing the petition for a writ of habeas corpus, dated January 31, 1990, October 1, 1990, and November 26, 1990, are not officially reported. The Orders are reprinted at pages a19, a56, and a69, respectively, of the Appendix to this petition. Portions of the transcripts from hearings reflecting either findings of fact or conclusions of law follow the corresponding orders. The unreported orders of the Virginia Supreme Court dismissing O'Dell's Petition for Appeal and denying rehearing are reprinted at pages a95 and a97 respectively, of the Appendix.

JURISDICTION

On April 1, 1991, the Virginia State Supreme Court entered judgment denying and dismissing Petitioner's appeal from the denial of his petition to the Circuit Court of the City of Virginia Beach for a writ of habeas corpus. On June 7, 1991, the Virginia Supreme court denied a timely motion for reargument and petition for rehearing. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL AND STATUTORY
PROVISIONS AT ISSUE

This case invokes the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It additionally involves the Code of Virginia §§ 8.01-654, 17-116.05:1(B), 19.2-169.1,.5, 53:1-151(B1) and Virginia Supreme Court Rules 5:9, :17, :21 and :22. The text of these provisions is set forth at pages a1-a13 of the Appendix to this petition.

STATEMENT OF THE CASE

On September 10, 1986, Joseph Roger O'Dell, III, after a six week arduous trial during which he proceeded pro se, was convicted of murdering Helen Schartner in a field behind the After Midnight Club in Virginia Beach, Virginia. On November 13, 1986, he was sentenced to death. O'Dell has consistently maintained his innocence of the crime -- a claim buttressed by evidence obtained from DNA testing and presented in a state habeas corpus hearing.

The Public Defender's office initially represented O'Dell. Four months after his appointment, the attorney from the Public Defender's office was, over O'Dell's protest, granted permission to withdraw from the case because of a claimed potential conflict (2:2-9).[1] In August, 1985 Paul Ray, a practitioner who had never before tried a capital case, was then appointed to represent O'Dell.

A. O'Dell's Competency Examination.

In October 1985, the Commonwealth moved to have O'Dell examined by an independent court-appointed psychiatrist for the triple purpose of determining his sanity at the time of the offense, his competency to stand trial, and

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1 All unspecified citations are to the trial transcript. The transcript comprises 63 volumes, any portion of which is available upon request.

his future dangerousness as a possible aggravating factor (3:3).[2] The Commonwealth intended to use the results of the evaluation in the sentencing phase, should one occur (3:3, 7).

O'Dell was unwilling to undergo a forensic evaluation because of the possible prejudice resulting from the conclusion regarding his "future dangerousness" (3:2). O'Dell further objected to the evaluation because of his experience following a prior psychiatric examination in 1975, which diagnosed him as a paranoid schizophrenic. Ray, however, believed that O'Dell's erratic behavior necessitated a sanity and competency inquiry (3:2). Ray's acquiescence to the proposed evaluation propelled O'Dell to seek Ray's removal as his counsel (4:2). The Court postponed consideration of O'Dell's motion to proceed pro se pending results of a psychological evaluation.

The trial court specified that the evaluation should encompass O'Dell's competency to waive counsel and

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2 Virginia law requires that the jury unanimously find, at the minimum, one of two statutory aggravating factors, either that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society ["future dangerousness"] or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile . . . ." Va. Code Ann. § 19.2-264.2.

represent himself, in addition to his competency to stand trial and his sanity at the time of the offense (5:20).

Rather than select a qualified forensic psychiatrist, the court appointed Dr. Stanley J. Kreider, a psychiatrist whose practice extended only to therapeutic applications of psychiatry. Dr. Kreider had no formal forensic training nor had he ever conducted a forensic evaluation in connection with a criminal trial other than those performed in connection with Navy courts-martial. Dr. Kreider had never, in any jurisdiction, conducted an evaluation to ascertain whether a defendant had the capacity to waive his right to counsel and represent himself.

Virginia law requires that an evaluating psychiatrist review, among other things, a summary of the reasons for the evaluation, statements made by the defendant to the police and at preliminary hearings and any relevant medical records. Va. Code Ann. §§ 19.2-169.1(c), 169.5(c).

The only information Dr. Kreider reviewed was that sent to him by Ray, who forwarded the court's order appointing Dr. Kreider as evaluator, a copy of Ake v. Oklahoma, 470 U.S. 68 (1985), a 1975 psychiatric evaluation of O'Dell, copies of the four indictments against O'Dell, and the victim's autopsy report. Dr. Krieder did not review any of the transcripts of preliminary hearings where O'Dell

expressed his suspicions about Ray and the Court system. The Commonwealth provided no materials whatsoever to Dr. Krieder.

Dr. Kreider interviewed O'Dell for one hour. He administered no formal psychological tests and conducted no more than a superficial investigation into O'Dell's social, mental, and neurological history. Dr. Kreider submitted a report to the Court explaining that he had examined O'Dell with regard to his mental state and the time of the commission of the crime and his competency to stand trial and assist counsel in preparing a defense. From this examination, Dr. Kreider concluded that O'Dell could "'make a voluntary and intelligent decision to waive his right to counsel and prepare his own defense' (6:2)." Rather than conduct an evidentiary hearing, the trial court read Dr. Kreider's naked conclusions into the record and declared that "[O'Dell] has a complete, clean bill of mental health (6:2-3)." The Court postponed consideration of O'Dell's motion to represent himself until other pending motions were addressed (6:3).

Following numerous conflicts between O'Dell and Ray, the court, without either ordering further psychiatric examination or making further inquiry into O'Dell's understanding of his waiver of counsel, granted O'Dell's third

motion to proceed pro se on December 18, 1985 (10:4-5). The Court nonetheless appointed Ray as "standby" counsel to advise O'Dell in what proved to be an unclear capacity.

Ray and O'Dell maintained a volatile relationship. At one point O'Dell warned that "I may fly off the handle and I might get shot or whatever and I don't want this gentleman [Ray] on my case (20:17)."

Even the Judge commented on O'Dell's "inability to emotionally control [himself] . . . in the court (22:44)." After hearing a particularly violent litany against Ray, the Judge informed O'Dell that "such statements concern me as to whether you are in fact in need of a reevaluation (23:21)."

At one point, Ray, acting "as an officer of the court," beseeched the court to hold

> a sanity and competency hearing for Mr. O'Dell. I believe it's crucial -- crucial from the events that have happened that he be re-examined by a psychiatrist and I will be glad to set forth for the record. There are several events which I believe would lead your Honor to determine that it is wise to do a sanity and competency hearing (23:30) (emphasis added).

Ray offered to reveal the information in camera (23:3). O'Dell objected to another evaluation (23:31). No further evaluation occurred.

B. The Commonwealth's Evidence at Trial.

The prosecution's case against O'Dell was purely circumstantial. The Commonwealth presented evidence that

tire tracks consistent with O'Dell's car were discovered in the area near Schartner's body, and that O'Dell and Schartner patronized the same bar on the night she was killed. However, there was no evidence that O'Dell knew Schartner, met Schartner that night, or ever spoke with her (44B:14). In addition, the evidence showed that O'Dell left the bar considerably later than Schartner (49:37).

The prosecution's attempt to link O'Dell with the victim was grounded on analysis of dried blood samples taken from O'Dell's soiled clothing which his estranged girlfriend had turned over to the Commonwealth. Not only was the test, referred to as multisystem electrophoresis, highly controversial, but the technician had completed her training in the method only two months prior to her unsupervised analysis of the evidence against O'Dell (47B:63, 76; 48B:29-30). Moreover, the photographs of the electrophoretic gels were of poor quality, rendering any analysis by defense experts difficult.

Although the testing method was controversial and the evidence critical, the Commonwealth failed to take precautions to preserve the evidence for retesting by the defense (10:65). Nor did the Commonwealth take steps to ensure that the stained clothes were uncontaminated by other sources, in particular the bloodied clothes of the victim,

prior to being tested. Notwithstanding these serious reliability problems, the trial Judge, who had previously denied O'Dell's request for a hearing on the reliability of the evidence (16:26-30, 16:33-39), allowed the technician to opine that the blood samples taken from O'Dell's shirt and jacket were consistent with samples taken from the victim (48:B:75-77).

Additionally, in a maneuver described by the trial court as "dirty pool" (47A:45), the Commonwealth called a purported jailhouse informant, Steven Watson, to the stand without any warning to the defense. The trial court, however, denied O'Dell's proffer of evidence that Watson offered to manufacture evidence in other trials as a means of evading jail (47C/B:3).

Watson testified that while O'Dell and he had been incarcerated in the Medical Block of the Virginia Beach city jail, O'Dell confessed committing the Schartner murder and described the circumstances leading up to her death. However, Watson's testimony conflicted with the Commonwealth's theory of the case and was also at odds with the testimony of eyewitnesses present at the County Line on the night of Schartner's murder. Contrary to Watson's testimony, not one of the eyewitnesses testified that O'Dell talked to or even knew Schartner, much less that he bought her drinks or left

the bar with her. In fact, the eyewitness testimony was that each left alone (49:35-44).

Moreover, contrary to Watson's emphatic denial that he negotiated a deal with the district attorney's office in exchange for testifying, shortly after Watson testified he was permitted to plead guilty to outstanding charges of breaking and entering, for which he received three years probation.

The prosecution offered no other evidence against O'Dell.

O'Dell presented an alibi defense. Upon leaving County Line, O'Dell proceeded to a number of night spots, ultimately ending up at the Brass Rail, where he became embroiled in a fight with two individuals. The general manager of the Brass Rail, a witness for the Commonwealth, testified that a fight had occurred in the parking lot of the Brass Rail on the night of Schartner's murder (48A:35). Although the manager did not observe the fight, he saw O'Dell in the parking lot after the altercation (48A:37). He asked O'Dell if "everything was all right because he appeared -- he was like -- like he had just got in a fight (48A:37)."

O'Dell has always maintained that the blood on his clothes was from a fight he had with a sailor, John Nutter.

During his closing argument in the guilt phase, the prosecutor repeatedly emphasized the "match" between the blood on O'Dell's clothes and blood from the victim. The jury convicted O'Dell of capital murder.

C. The Prosecutions Statements Regarding O'Dell's Parole Eligibility.

The prosecutorial strategy during the penalty phase was designed to convey to the jurors that imprisonment was ineffectual to curb O'Dell's criminal behavior. The unspoken but clear implication was that nothing short of death would keep O'Dell out of circulation.

In furtherance of this strategy, the prosecution highlighted O'Dell's past parole releases. The Commonwealth cross-examined O'Dell in exacting detail about these previous releases and pointed out that O'Dell served only seven months on a 1961 sentence, and only thirteen months on his next sentence, and was on parole at the time of Schartner's murder (56:142-143). The Commonwealth raised the spectre of O'Dell's parole again in its closing argument when it alluded to Florida's mistake for paroling O'Dell in 1982 (56:202).

O'Dell sought to counter the prosecutor's false statements with a jury instruction or testimony that he would be statutorily ineligible for parole if sentenced to

life imprisonment. The Virginia Code, § 53.1-151(B1), provides that

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

O'Dell had previously been separately convicted of the offenses enumerated in the statute. However, each time O'Dell sought to introduce his statutory parole ineligibility he was rebuffed by the Court (56:88, 133). Yet, prior to trial, the trial judge had described evidence of parole ineligibility as a "very, very relevant matter" in a capital case. The judge stated that it "could become a very key issue as to whether the jury should be told at some point what effect [parole] would have on [the defendant], so just bear that in mind. It's going to be difficult problem for the Commonwealth, [the defendant], and the Court if it becomes an issue; and it very well may" (31:61-62).

The jury sentenced O'Dell to death without knowing that O'Dell would not be eligible for parole if sentenced to life.

O'Dell was represented by counsel on appeal. The Supreme Court of Virginia affirmed the conviction and sentence of death on January 15, 1988. O'Dell v. Commonwealth

of Virginia, 234 Va. 672, 364 S.E.2d 491 (1988), mod'd on rehearing, Record No. 861219 (Va. Apr. 1, 1988). Appellate counsel, along with the firm of Paul, Weiss, Rifkind, Wharton & Garrison ("Paul, Weiss") filed a petition for a writ of certiorari to the United States Supreme Court on O'Dell's behalf. The petition was denied. 448 U.S. 871 (1988).

D. State Habeas Corpus.

Attorneys from Paul, Weiss, along with Andrew R. Sebok, an attorney appointed by the Virginia Court, filed a petition in the state court for a writ of habeas corpus. The petition, as amended, raised numerous claims of constitutional dimension including:

1. The blood serology tests were conducted improperly, and the failure to exclude evidence based on these tests was constitutional error. During a hearing on the habeas petition, O'Dell introduced evidence based on DNA testing -- technology unavailable at the time of Mr. O'Dell's trial and conviction -- which invalidated the principal evidence used against him at trial, the purported "match" between the blood stains on O'Dell's clothing and the victim's blood. The results of the testing conclusively demonstrated that the blood found on Mr. O'Dell's shirt

either was not the victim's or could not reliably be linked to the victim, a fact uncontested by the Commonwealth.[3]

2. The trial court's refusal to allow O'Dell to rebut the prosecutor's assertions that he would be eligible for parole if sentenced to life imprisonment rendered the death sentence unreliable. Gardner v. Florida, 430 U.S. 349 (1977).

3. The trial court granted Mr. O'Dell's request to relieve Ray without either making an adequate inquiry into whether Mr. O'Dell was competent to waive counsel, as required under Faretta v. California, 422 U.S. 806 (1975), and its progeny or ensuring that the appointed psychiatrist was qualified to conduct the forensic evaluation. Further, the Commonwealth failed in its statutory duty to provide necessary materials to the evaluating psychiatrist. Finally, the Circuit Court, after granting O'Dell's motion to proceed pro se failed to properly monitor O'Dell's capacity to represent himself.

O'Dell also raised numerous other claims in his first petition. O'Dell subsequently filed an Amended Peti-

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[3] A transcript of the October 23, 1990, evidentiary hearing on the petition (hereinafter "October 23 hearing") is available upon request. Portions of the transcript, including the court's findings of fact and conclusions of law, are reprinted at pages a72-a94 of the Appendix to this petition.

tion and a Second Amended Petition.[4] The Circuit Court, on January 31, 1990, dismissed all but two of the twenty-three claims in the Second Amended Petition. The court applied procedural bars enunciated in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970) (claim raised on appeal), and Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975) (claim not raised on appeal), to dismiss the majority of these claims.

Other grounds for relief alleged in the Petition were dismissed on the merits without benefit of an evidentiary hearing.

On October 23, 1990, the Circuit Court of Virginia Beach held an evidentiary hearing limited to (1) O'Dell's claim that the procedure by which he was deemed competent to waive counsel was constitutionally insufficient and (2) the presentation of results from recent DNA analysis demonstrating error in the blood analysis at trial. The habeas court applied a res judicata bar to the serological evidence and entered factual and legal findings dismissing the competency claims.

Counsel to O'Dell filed a timely notice of appeal from the dismissal of the state habeas petition. Va. Sup.

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[4] A catalog of claims raised in the Second Amended Petition is included in the Appendix at page a14.

Ct. Rule 5:9. Believing the appeal to be "of right" counsel then filed a document entitled "Assignments of Error" (reprinted at p. a109 of the Appendix) within the statutory three month limitations period. On March 6, 1991 -- over one week after the last date for a timely filing, the deputy clerk of the Virginia Supreme Court and the attorney for the Commonwealth informed counsel that, in their view, a document entitled "Petition for Appeal" rather than a document entitled "Assignments of Error" was required to be filed in an appeal from the denial of a state habeas petition. At the same time the attorney for the Commonwealth informed counsel that he would not oppose O'Dell's supplementation of his filings with this additional document.

Two days later, counsel for O'Dell filed a motion for an order allowing him to perfect his appeal. The Commonwealth reversed its position and opposed the motion. On March 15, 1991, counsel for O'Dell filed a document entitled "Petition for Appeal." On April 1, 1991, the Virginia Supreme Court denied O'Dell's motion and rejected the appeal. The Virginia Supreme Court denied O'Dell's timely petition for rehearing on June 7, 1991.

REASONS FOR GRANTING THE WRIT

I.

THE TRIAL COURT'S REFUSAL TO ALLOW O'DELL THE OPPORTUNITY TO REBUT THE PROSECUTION'S MISLEADING STATEMENTS REGARDING HIS PAROLE ELIGIBILITY RENDERS THE DEATH SENTENCE UNRELIABLE

The death sentence meted to O'Dell is unreliable because of the trial court's refusal to permit O'Dell to rebut the prosecution's inaccurate statements and suggestions to the jury regarding O'Dell's eligibility for parole if sentenced to life. Gardner v. Florida, 430 U.S. 349 (1977). This Court should grant certiorari to vacate the decision of O'Dell's sentencing jury because it was based, in substantial part, upon "information which he [(O'Dell)] had no opportunity to deny or explain." Id. at 362 (Stevens, J). Allowing a death sentence to stand under these conditions violates the Eighth Amendment since the jury determined whether to impose the death sentence on the basis of inaccurate information as a result of the unconstitutional limitation on O'Dell's due process right. See id. at 360.

Moreover, in light of Virginia's inclusion of a defendant's future dangerousness as an aggravating factor in the death sentence determination, fundamental fairness unquestionably requires that O'Dell have the opportunity to rebut inaccurate information offered by the prosecution as

evidence of that aggravating factor. See Payne v. Tennessee, ___ U.S. ___, 111 S. Ct. 1407 (1991) (fundamental fairness dictates that the prosecution and defense are provided with equal opportunities to counteract the evidence put forth by the other in the penalty phase).

This Court has, consistently, reaffirmed its statement in Woodson v. North Carolina, 428 U.S. 280 (1976) that the "qualitative difference" between a death sentence and all other punishment requires a "corresponding difference in the need for reliability in the determination that death is the appropriate sentence." Id. at 305; see also Beck v. Alabama, 447 U.S. 625, 643 (1980); Green v. Georgia, 442 U.S. 95, 97 (1979).

It is axiomatic that the jury be provided with accurate and wide ranging evidence to ensure a reliable sentencing determination. See California v. Ramos, 463 U.S. 992, 1009 n. 23. In no case is this more essential than when, as here, the prosecution raises inaccurate propositions. Accuracy demands that a defendant be permitted to rebut, deny and explain information proffered by the prosecution. See id. at 1004 (explaining Gardner v. Florida).

Given the need for accuracy in the jury's determination of O'Dell's future dangerousness, the Virginia Court should have allowed O'Dell the opportunity to explain his

parole ineligibility to the jury once the prosecution opened the door on the subject. Rather, the trial court's rulings fueled the prosecutorial strategy by allowing the prosecution, over strenuous objection, to raise the spectre of O'Dell's parole.

Finally, any doubt in the jurors' minds regarding O'Dell's parole eligibility was arguably cast aside by the prosecutor's closing statement that "no sentence ever meted out to this man has stopped him, and nothing ever will except the punishment that I now ask you to impose. (56:204)"

The trial court's action directly contravenes this Court's pronouncement in Gardner v. Florida, supra. In Gardner, the petitioner had challenged the validity of his sentence because the trial judge, in imposing the death sentence, relied in part on information contained in a confidential presentence investigation report that neither the defendant nor his counsel had seen and therefore could not controvert. A plurality of the Court held that due process requires there be an "opportunity for petitioner's counsel to challenge the accuracy or materiality" of the presentence investigation report. Gardner, 430 U.S. at 356. The court vacated the petitioner's punishment, finding that he "was denied due process of the law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Id. at 362 (emphasis added).

The rule of Gardner derives from the principle deeply embedded in American law -- that the adversarial system is the paramount means of promoting reliability in courtroom determinations. See id. at 360. On numerous occasions this Court has reaffirmed Gardner's central proposition -- a reliable verdict is only achieved through adversarialness in the courtroom. See, e.g., Skipper v. South Carolina, 476 U.S. 1, 5, n.1 (1986); California v. Ramos, supra, 463 U.S. at 1004; Presnell v. Georgia, 439 U.S. 14, 16 (1978); see also Gholson v. Estelle, 675 F.2d 734, 738 (5th Cir. 1982) (defendant's inability to challenge testimony on his future dangerousness violates Gardner).

Although this Court has not specifically evaluated a Gardner challenge based on a prosecutor's remarks regarding a defendant's parole eligibility, petitioner urges the Court to adopt the sensible approach articulated by the Fifth Circuit in Byrne v. Butler, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988).[3] The capital defendant

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[3] Petitioner does not seek the creation of a "new rule" within the meaning of Teague v. Lane, 489 U.S. 288 (continued...)

in Byrne, like O'Dell, claimed that the prosecutor made erroneous remarks suggesting that he could eventually be released on parole.[6]

However the trial court in Byrne, contrary to the judge presiding at O'Dell's trial, permitted defense counsel to state, on voir dire, that "the parole board was powerless to grant parole to a person sentenced to life imprisonment." Id. at 506. Although the trial court refused to allow the

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[5] (...continued)
(1989). A ruling that O'Dell's death sentence is unreliable because O'Dell could not rebut the prosecution's statement does not "break new ground" nor "impose a new obligation" on the State of Virginia. Id., 489 U.S. at 301. Rather, O'Dell's right to rebut the prosecution's inferences is dictated by this court's decisions in Woodson, Gardner and Ramos which were decided years prior to O'Dells conviction.

Moreover, the error claimed by O'Dell fits into the exceptions to Teague as it directly implicates his basic due process right which is central to the fundamental fairness and accuracy of the sentencing determination. See Saffle v. Parks, 494 U.S. 484, 110 S. Ct. 1257, 1263 (1990) (discussing exceptions to Teague).

[6] Under Louisiana law, however, the only sentencing alternatives available to the jury were either death or life imprisonment without the possibility of probation, parole, or suspension of sentence. Byrne, 845 F.2d at 508. The relevant Louisiana code provision states:

> Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

La. Rev. Stat. Ann. § 14:30(C) (1986).

defendant to further inquire into the venirepersons' understanding of "life imprisonment" and parole, the Judge overruled the prosecutor's objection to defendant's remark and "admonished the jury to disregard the attorney's depiction of the law and to concentrate instead on the law as given to them by the trial court." Id.

The defendant in Byrne attempted to argue that the prosecutor's objections and the trial court's admonishment rendered the verdict unreliable under Gardner. The Fifth Circuit rejected the Gardner claim on the following three grounds: (a) the prosecution failed to "directly interject the notion of pardon or commutation of sentence into the proceedings"; (b) Byrne's counsel was repeatedly permitted to explore the meaning of life imprisonment in front of the jury; and (c) at the time of the sentencing, the trial judge charged the jury that it "must now determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence." Byrne, 845 F.2d at 508, n.7 (quoting jury charge) (emphasis added in opinion).[7] Relying on all these

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[7] The Fifth Circuit also noted that "[t]he underscored phrase was uttered four more times by the trial court in the course of the charge." Byrne, 845 F.2d at 508, n.7.

factors, the court held Gardner to be "inapposite to the case at bar." Id. at 509.

The Byrne court implicitly developed parameters by which to judge a Gardner challenge based on a court's failure to allow defendant to respond to a prosecutor's inaccurate statements relating to defendant's parole eligibility. Once the prosecutor has interjected the notion of pardon or commutation of sentence into the proceeding, the trial court must either allow defense counsel to explore "the meaning of life imprisonment before the jury" or properly instruct the jury that the alternative to death is "life imprisonment without the benefit of probation, parole or suspension of sentence." A trial court's failure to ensure that the jury receives accurate information regarding a defendant's parole ineligibility through one of these specified alternatives, renders the verdict unreliable under Gardner.

O'Dell's trial judge failed to meet the Byrne criteria. The trial judge allowed the prosecution to elicit testimony from O'Dell and to make statements during his closing argument which sent a direct message to the jurors that O'Dell, if sentenced to life imprisonment, would be released on parole. At the same time, the judge refused to allow O'Dell to introduce evidence as to his statutory

ineligibility for parole. Finally, the trial judge failed to correct the imbalance when it refused a jury instruction on the Virginia law of life without parole. Accordingly, O'Dell's death sentence is unreliable under Gardner.

Certiorari therefore is necessary because the Virginia court's formalistic adherence to its prohibition on allowing evidence of a defendant's statutory parole ineligibility, even where the prosecutor raises the spectre that defendant's parole, is unconstitutional. Such a policy thwarts the proper functioning of the adversarial system which requires that a jury deciding on whether or not to impose the death sentence is not left to deliberate with unrebutted inaccurate information.

II.

VIRGINIA APPLIED ITS PROCEDURAL BARS TO O'DELL'S HABEAS PETITION IN AN UNCONSTITUTIONAL MANNER

The Virginia habeas court's erroneous application of its procedural bars enunciated in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970) and Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1975), undermines the principle of comity underlying the exhaustion requirement of federal habeas corpus and denies O'Dell due process of the law. See Rose v. Lundy, 455 U.S. 509, 518 (1982).

Virginia law recognizes two principal procedural bars to the review of claims asserted in a habeas petition. Slayton v. Parrigan, supra, prohibits a petitioner from circumventing the appellate process by barring review of claims on habeas corpus that the petitioner neither objected to at trial nor raised an appeal. Hawks, supra, on its face prohibits a habeas petition from raising identical claims in successive habeas petitions; as applied by Virginia courts, however, it has been routinely used to strike from initial petitions any issue raised on direct appeal; Hawks and Slayton, as applied by the Virginia court to O'Dell's state habeas petition, has thoroughly stifled O'Dell's ability to exhaust his state remedies. As this Court has stated, "The doctrine of exhaustion of state remedies . . . presupposes that some adequate state remedy exists." Young v. Ragen, 337 U.S. 235, 238-39 (1949). This Court should grant certiorari to ensure that Virginia courts adhere to the principles of comity by providing O'Dell, and future criminal defendants, the opportunity to exhaust their federal and state claims in a state forum prior to applying for federal habeas corpus relief.

The Virginia habeas court erroneously applied Hawks to bar O'Dell from raising, in this, his only state habeas petition, any state and federal claims which had

previously been "considered" by the Virginia Supreme Court on his direct appeal, notwithstanding the fact that the Virginia Supreme Court had never ruled on the merits of certain claims, nor on the federal basis of others.[1] Likewise, the habeas court's application of Hawks foreclosed consideration of O'Dell's claims resting on "changed circumstances" in the nature of substantial new evidence obtained from DNA testing which not only legitimately placed the credibility of the Commonwealth's central evidence into doubt, but provides a solid basis for O'Dell's claim of innocence.

The Virginia Circuit Court's application of Hawks is manifestly not grounded in the law of the case. Even a cursory reading of Hawks reveals that the case provides no support for the proposition that claims raised in a state habeas petition are res judicata merely because a petitioner presented the same argument in his brief on direct appeal.

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[1] On direct appeal, the Virginia Supreme Court never addressed the merits of (1) O'Dell's arguments regarding the highly prejudicial admission of evidence relating to a wholly separate crime and (2) the trial court's improper restriction of the cross examination of certain witnesses. Nor did the Virginia Supreme Court address the federal basis of many claims raised by O'Dell on direct appeal, including two issues raised in this petition (1) O'Dell's claim that the exclusion of evidence of his statutory parole ineligibility was unconstitutional and (2) the trial court's improvident acceptance of O'Dell's request to waive counsel.

Rather, Hawks is meant to apply against defendants who abuse the writ of habeas corpus. The petitioner in Hawks "busily engaged in filing" numerous state and federal habeas petitions. 211 Va. at 91, 175 S.E.2d at 272. The petitioner's claims in Hawks had each been "rejected by more than one court of competent jurisdiction." Id. at 91, 175 S.E.2d at 272. This Court had twice denied Hawks certiorari to hear claims alleged in his prior state habeas petitions. Id. at 92, 175 S.E.2d at 272.

Rather than adopt a res judicata bar to claims raised in habeas petitions, the Hawks court adopted the federal rule which harmonized with Virginia Code § 8-605, thereby permitting Virginia courts to "reject repetitive habeas corpus petitions if the allegations have been previously decided on the merits and the ends of justice would not be advanced by further consideration." Hawks, 92 Va. at 95, 175 S.E.2d at 274 (citing Alford v. North Carolina, 405 F.2d 340, 342 (4th Cir. 1968), rev'd on other grounds, 400 U.S. 25 (1970) (emphasis added)).

The habeas court's erroneous application of Hawks and concurrent application of Slayton v. Parrigan, supra, creates a "damned if you do -- damned if you don't" approach to habeas corpus relief: a petitioner is barred by Hawks from raising a claim in a habeas petition if he properly

raises the issue on direct appeal, yet barred by Slayton from raising the claim if he failed to raise the issue on appeal. As Virginia provides no avenues of post-conviction review aside from habeas corpus, the court's application of Hawks and Slayton operates as a "one-two" punch foreclosing O'Dell from obtaining meaningful collateral review. The Virginia rule seriously undermines the principle of comity underlying the exhaustion requirement of federal habeas corpus, and is offensive to the Fourteenth Amendment.

A. Virginia's Application of Its Procedural Rules Ignores The Principles of Comity Underlying State and Federal Post-Conviction Review.

The exhaustion requirement of 28 U.S.C. 2254(b) is grounded in principles of comity. Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion promotes the policy that states should, in the first instance, address and correct the violations of a state prisoner's federal constitutional rights. Coleman v. Thompson, ___ U.S. ____, 111 S. Ct. 2546, 2554-55 (1991). Foremost, the exhaustion doctrine presupposes the existence of adequate state remedies through which defendants can seek review of their federal and state claims. Young v. Ragen, 337 U.S. 239, 238-39 (1949); cf. Case v. Nebraska, 381 U.S. 336 (1965). Virginia's arbitrary application of its procedural bars to habeas petitions

subverts the principles underlying comity. Habeas corpus is not available as an avenue for exhaustion, nor does Virginia provide an alternative form of post-conviction review. This Court should grant certiorari to halt any further erosion of the principle of comity by the Commonwealth of Virginia.

State post-conviction review must be coextensive with federal habeas corpus review to promote comity and lessen federal-state tensions. Without co-extensive state and federal review, federal habeas courts will typically find themselves evaluating claims that had never been presented to state courts in the first instance, because the relevant state statute barred a petitioner from raising the federal nature of the claim.[9]

Federal appellate courts frequently express their frustration that inadequate state post-conviction review results in increased federal habeas filings. See, e.g., United States ex rel. Williams v. Brantley, 502 F.2d 1383, 1387 (7th Cir. 1974) (respect for the constitution not fostered by state post-conviction procedure that forecloses post-conviction review of any constitutional issue if the defendant chose to appeal his conviction); Keener v.

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[9] A rudimentary axiom of habeas corpus procedure requires that a state prisoner present the federal nature of her claim to the state court in order to fulfill the exhaustion requirement. Picard v. Connor, 404 U.S. 270, 275 (1971).

Ridenour, 594 F.2d 581, 590 (6th Cir. 1979) (cautioning that so long as Ohio Post-Conviction relief is not co-extensive with federal statutory habeas corpus, federal courts must repeatedly review merits of constitutional claims that have not been addressed by state courts).

The Seventh Circuit, in Gray v. Greer, 707 F.2d 965, 967 (7th Cir. 1983) criticized Illinois adoption of the "damned if you do, damned if you don't" approach to state habeas.[10] which requires the federal habeas court to waive the exhaustion requirement in order to consider the merits of a constitutional claim. Should Virginia continue to apply Hawks as a res judicata bar to claims raised in a first habeas petition, the petitioner's only redress will be to seek review in the first instance on federal habeas, thereby fostering the implosion of the exhaustion doctrine.

Moreover, this Court has expressed a predilection toward allowing states to bear the primary burden for administrating their criminal law. See, e.g., Coleman v. Thompson, supra, 111 S.Ct. at 2254; Case v. Nebraska, 381 at

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[10] Virginia's application of its procedural bars is more restrictive than the Illinois approach. Illinois provides an exception that allows the court to relax the res judicata bar and review the merits of a claim when "fundamental fairness" so requires. Gray, 707 F.2d at 968. Although O'Dell urged the Virginia court to rule on certain of his claims "in the interests of justice," the Court refused to abide by these requests.

344. Congress has expressed the same preference. For example, 28 U.S.C. § 2254(d) requires a federal habeas court to defer to a state habeas court's findings of fact. However, a federal court need not defer to the state court if the petitioner was not afforded a full and fair hearing in state court. 28 U.S.C. § 2254(d). Virginia has shirked its responsibility in this area by applying procedural bars to claims which merit factual findings.

O'Dell did not receive a full and fair hearing on his habeas petition. Although O'Dell received a hearing on two of the claims, the presiding judge, rather than enter factual findings, simply applied the Hawks bar to consideration of the DNA evidence as a means of escaping his duty to adjudicate the claim. (October 23 hearing at pages 261-62, reprinted at pages a91-a92 of the Appendix.) The federal habeas court will necessarily hold a de novo evidentiary hearing on the factual issues underlying many of O'Dell's claims because of the state court's abrogation of its responsibility to provide O'Dell with full and fair hearings.

Additionally, the habeas court's application of Hawks as a means of "ducking" certain federal claims presented by O'Dell is an abrogation of its responsibility to promote comity and "to guard and enforce every right secured

by the constitution." Mooney v. Holohan, 294 U.S. 103, 113 (1935). A state court must provide a defendant with reasonable opportunity to raise a federal question or the doctrine of exhaustion would be rendered a nullity. See Picard v. Connor, 404 U.S. 270, 275 (1971).

On direct appeal, the Virginia Supreme Court never considered the federal basis of a number of O'Dell's claims.[11] The habeas court cannot merely ignore the federal basis of the majority of O'Dell's habeas petition by applying Hawks as a res judicata bar when the alleged constitutional violations have not been addressed.

Even the judge who applied Hawks recognized the serious constitutional implications of O'Dell's claim regarding the prosecution's misstatements about O'Dell's parole eligibility. After hearing arguments on the issue, the habeas judge opined, "I tell you what I'm going to do for you. I'm going to dismiss it and you can let the

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[11] Aside from the claim regarding O'Dell's parole ineligibility, the published opinion on direct appeal fails to reach the federal grounds of numerous other claims raised in the appellate briefs, including: the validity of the waiver of counsel; inadequate warnings of self-representation; improper limitation of cross-examination of Commonwealth experts; the discharge of Peter Legler; the disproportionate slant of the voir dire questions regarding the probability of the death penalty; improper limitation on the cross-examination of Watson; the failure to instruct the jury on the definition of mitigating evidence and the erroneous admission of the serological evidence.

federal boys rule on it. I think it worthy of an answer frankly. I mean that in all seriousness." (August 22, 1989 hearing pages 81-82, reprinted in Appendix at pages a34-a35) Judge Spain was laboring under a misconception, however, when he stated that "I think its going to come in a federal court . . . if it's a federal question when I think its ultimately going to end up in a federal writ, and let the federal courts rule at that point." (Id. at page a35) Judge Spain subsequently clarified that Hawks was grounds for his dismissal. (January 31, 1990 order, reprinted in Appendix at page a19).

We submit that not only did the court erroneously apply Hawks, but that the Virginia's adoption of the "damned if you do -- damned if you don't" approach to habeas corpus is a direct assault on the principles of comity inherent in the nexus between federal and state post-conviction review -- the exhaustion doctrine.

B. Virginia May Not Apply Its Procedural Rules in an Unconstitutional Manner.

While petitioner recognizes that this Court has ruled that collateral review proceedings are not constitutionally required, Murray v. Giarratano, 492 U.S. 1, 10 (1989), once a state has created a substantive right to adjudicate a claim it is bound to administer its procedural

rules within the confines of the Fourteenth Amendment. See, e.g., Logan v. Zimmerman, 455 U.S. 422 (1982), Hicks v. Oklahoma, 447 U.S. 343 (1980), Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam). The Virginia Court's application of Hawks as a res judicata bar denied O'Dell his state-created right to post-conviction review.

In Logan v. Zimmerman, supra, this Court found that the state, once it created a forum for litigating a claim, could not arbitrarily deny the litigant the opportunity to exploit the remedy. Logan 455 U.S. at 429-30. The Logan court consequently found that the dismissal of the petitioner's employment claim because of a scheduling error violated due process. Id. at 437. See also Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (state created liberty interest to be sentenced within the jury's discretion cannot be arbitrarily extinguished).

The Virginia Supreme Court has stated that "[i]t is well settled that the deprivation of a constitutional right of a prisoner may be raised by habeas corpus." Griffin v. Cunningham, 205 Va. 349, 355, 136 S.E.2d 840, 845 (1964). Virginia's application of Hawks as a res judicata bar to effectively foreclose O'Dell's use of Virginia's habeas corpus and thereby denies O'Dell the opportunity to fully exploit the state created remedy. The habeas court's

action is directly analogous to the state action in Logan. Consequently, as this Court held in Logan, Virginia has unconstitutionally applied its procedural rules.

Roberts v. LaVallee, supra, (per curiam) is also analogous. Roberts, this Court found a New York statute unconstitutional in that it created unequal access to transcripts of a preliminary hearing. While the Roberts court did not explicitly hold that the defendant had a constitutional right to a preliminary hearing, id. at 42, it nonetheless found that equal protection required New York to provide equal access to a transcript of that hearing. The import of Logan and Roberts is clear -- a state's application of a procedural rule must satisfy the requirements of the constitution.[12] The Court should grant certiorari to correct the misperception of the Virginia jurists regarding their obligation to enforce their procedural rules to protect rather than deny criminal defendants their rights secured by the United States Constitution.

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[12] This Court subscribes to a corollary rule that novel or sporadically applied state procedural rules are insufficient to preclude federal habeas review. See, e.g., NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 457-58 (1958); Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

III.

THE HABEAS COURT ERRONEOUSLY CONCLUDED THAT O'DELL'S WAIVER OF COUNSEL WAS CONSTITUTIONAL

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Gideon v. Wainwright, 372 U.S. 335 (1963). The constitution also guarantees the defendant's right to waive counsel and represent himself, but only if the waiver of counsel is knowing, intelligent and voluntary. Faretta v. California, 422 U.S. 806 (1975). An accused's right to effective assistance of counsel is violated if the procedure used to insure that his waiver of that right is fundamentally defective. See Johnson v. Zerbst, 304 U.S. 458, 465 (1938). This Court should grant certiorari in this case to vacate O'Dell's conviction, which was obtained on the basis of a defective waiver of counsel.

The habeas judge erroneously concluded that the precedent of this Court does not require that O'Dell, a man with a history of psychiatric problems, be examined by a psychiatrist before waiving counsel. The habeas judge further erred by assuming that the examination, if inadequate, did not prejudice O'Dell. Clearly, O'Dell's pro se status alone significantly contributed to his conviction. Finally, the habeas court erred in accepting the findings of

defendant's court appointed examining psychiatrist as sufficient, despite the fact that the psychiatrist (1) was unqualified to conduct the evaluation as to his competency, (2) evaluated O'Dell on statutorily deficient information and (3) failed to even evaluate O'Dell specifically on his competency to represent himself. Additionally, the trial court abrogated its constitutional responsibility to re-evaluate O'Dell's competency to represent himself when O'Dell's irrational behavior became manifestly evident during the course of the trial.

A. The Deficient Examination.

Petitioner submits that the habeas court erroneously ruled that the decisions of this Court did not require a psychiatric examination of O'Dell prior to the trial court's acceptance of his waiver of counsel.

In Westbrook v. Arizona, 384 U.S. 150 (1966) (per curiam), this Court differentiated between a defendant's competency to stand trial and his competency to waive his right to counsel and proceed pro se. The Court vacated the judgment of conviction as the petitioner in Westbrook had not been afforded a hearing on the latter. Id. at 151. Although, as the habeas court noted, Westbrook does not require a psychiatric examination of a defendant prior to waiving counsel in every instance nonetheless, due process

requires an examination of the defendant if circumstances so dictate. See Pate v. Robinson, 383 U.S. 375 (1966).

The habeas court misinterpreted the import of this Court's decisions in Pate and Westbrook -- psychiatric examinations are constitutionally required if the defendant's demeanor prior to trial compounded with his behavior at trial, raises a question as to his competency. See Drope v. Missouri, 420 U.S. 162, 181 (1985). The habeas judge's reliance on the hyper-technical finding that a psychiatric examination is not universally necessary before a defendant can waive his right to counsel avoids the logic underlying these opinions. O'Dell's erratic behavior and psychological history necessitated an evaluation of his competency. The habeas judge should not have accepted Dr. Kreider's evaluation as sufficient on either O'Dell's competency to stand trial or to proceed pro se. Even if Dr. Kreider's conclusion that O'Dell was competent to stand trial was valid, this was far from determinative on the issue of O'Dell's competency to represent himself, a determination which requires a finding of higher level of competency. See Westbrook 384 U.S. at 150.[13]

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[13] The testimony elicited at the October 23, 1990 evidentiary hearing clearly demonstrates that Dr. Kreider's examination failed to even satisfy the fundamental requirement of an evaluation for competency to stand (continued...)

Dr. Kreider's determination was deficient both as a matter of the Virginia law, which requires that the prosecution and defense provide specified information to the examining psychiatrist, Va. Code Ann. §§ 19.2-169.1(C), .5(C), and additionally, as a matter of professional standards.

Dr. Kreider was thoroughly unfamiliar with the mental stamina necessary to effectively represent oneself -- heightened by the fact that O'Dell's life was on the line. Dr. Kreider failed either to diagnose or identify deficiencies in O'Dell's psychopathology that at a minimum seriously handicapped his performance as pro se counsel. Ignorant of disabilities that would significantly affect his capacity to represent himself, O'Dell was not fully aware of the risks of self-representation, thus could not have made the knowing and intelligent waiver of counsel required by Faretta. To compound matters, the trial court failed to described specifically to O'Dell the complexities of trial procedures and the stern ramifications of failing to comply with those procedures including the limitation on appellate review.

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[13] (...continued)
trial, see Dusky v. United States, 362 U.S. 402 (1960) (per curiam), or of O'Dell's mental state at the time of commission of the alleged offenses.

Moreover, the habeas court erroneously found that the insufficient examination did not prejudice O'Dell. At the October 23, habeas hearing two experts in the field of forensic psychology both testified that Dr. Kreider's examination of O'Dell was insufficient. In addition, evidence of O'Dell's behavior during the criminal trial supports his claim that if all appropriate information had been given to Dr. Kreider, or if Dr. Kreider had conducted a proper forensic examination according to generally recognized medical standards, the outcome of the competency to waive counsel analysis may well have been different.

B. The Trial Court Should Have Revisited the Determination of O'Dell's Competency.

The habeas court ruled that the trial court did not err in failing to revisit the issue of O'Dell's competency. Specifically, the habeas court found that competency only need be revisited in extreme cases. To the contrary; once a trial court has initially determined that defendant is competent, the court is under continuing obligation to act promptly to revisit the issue if circumstances "suggest[] a change that would render the accused unable to meet the standards of competence to stand trial." Drope v.

Missouri, 420 U.S. at 181 (1975).[13] Here, the trial judge's professed observations on O'Dell's demeanor, compounded with Mr. Ray's pleas that O'Dell needed additional evaluation demonstrated the need per Drope to revisit the competency issue. The trial court, in failing to revisit the issue of O'Dell's competency thus breached its continuing obligation to monitor O'Dell's competence to continue pro se.

The Court should have monitored O'Dell with vigilance especially when, as here, the accused conducts his own defense in a capital trial. It is quite clear from the record, that O'Dell's rationality deteriorated during proceedings. The trial court, on notice of O'Dell's psychiatric history, should have ordered a full scale inquiry into O'Dell's competency to defend himself. The court's omission in this regard is clear constitutional error.

The initial deficiency of Dr. Kreider's examination compounded with the trial court's abdication of its

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[13] The habeas court created a false distinction between revisiting competency to stand trial and competency to waive counsel. The habeas court limited the application of Drope to competency to stand trial. (October hearing pp. 248-49, reprinted in Appendix at pages 78a-79a). Any distinction is unwarranted. Competency to represent oneself requires a higher level of mental stability than competency to stand trial and therefore demands heightened scrutiny. See Brewer v. Williams, 430 U.S. 387, 404 (a court should engage in every reasonable presumption against a waiver of counsel).

responsibility to continually monitor defendant's competency violates O'Dell's constitutional right to the effective assistance of counsel. This Court should grant certiorari to vacate the judgment of the Virginia Court and allow O'Dell a new trial at which he may be represented by competent counsel.

IV.

THE VIRGINIA SUPREME COURT'S DISMISSAL OF O'DELL'S HABEAS PETITION DOES NOT DEPRIVE THIS COURT OF JURISDICTION

Petitioner recognizes that a question of federal law dismissed by a state court judgment pursuant to independent and adequate state rule of procedure forecloses this Court's ability to review the federal question. Coleman v. Thompson, ___ U.S. ___, 111 S. Ct. 2546, 2553-54 (1991). Petitioner submits, however, that the Virginia Supreme Court's dismissal of O'Dell's appeal from the Circuit Court's dismissal of his habeas corpus petition was not sufficiently independent or adequate under this Court's pronouncements in Ake v. Oklahoma, 470 U.S. 68 (1985) and James v. Kentucky, 466 U.S. 341 (1984) to bar reviews by this Court.

The dismissal of O'Dell's petition for appeal was not independent of federal law, as consideration of O'Dell's

motion papers prior to the dismissal of his petition for appeal implicated an "antecedent ruling on federal law." Ake v. Oklahoma, 470 U.S. at 75. The Virginia Supreme Court has extended the time for filing a petition for appeal from a denial of a writ of habeas corpus when "it is found that to deny the extension would abridge a constitutional right." Tharp v. Commonwealth, 211 Va. 1, 3, 175 S.E. 2d 277, 278 (1970) (per curiam). Given that O'Dell relied on Tharp as a basis for obtaining relief in his motions to the Virginia Supreme Court, that Court necessarily considered whether a federal constitutional right would be dishonored before denying O'Dell's motion to perfect his appeal. Petitioner submits that the dismissal of the appeal consequently does not bar this Court's review of the state court judgment.[15]

Coleman v. Thompson, decided by this Court last June, is factually inapposite to O'Dell's petition. In Coleman, this Court rejected petitioner's contention that Ake applied to the Virginia Supreme Court's dismissal of petitioner's appeal for failure to file a timely notice of appeal.

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[15] Should this Court find that it possesses jurisdiction to review O'Dell's claims, it need not remand the case to the Virginia Supreme Court, but rather, may immediately address the merits raised by O'Dell's petition. NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964).

However, this Court, in Coleman, held that the rule in Tharp requiring the Virginia Supreme Court to consider whether a Constitutional right was abridged before granting an extension of time only applied, if at all, to Petitions for Appeal. Coleman, 111 S. Ct. at 2561. Tharp clearly creates an exception for an untimely filing of a Petition for Appeal. O'Dell filed a timely notice of appeal and timely "Assignments of Error." O'Dell sought to supplement the filings with a "Petition for Appeal." Consequently, the Virginia Supreme Court, under the Tharp rule, must have weighed the federal constitutional claims raised by O'Dell in his motion to file a delayed Petition for Appeal.

Nor did the Virginia Supreme Court's dismissal of O'Dell's petition rest on an adequate state ground as the Virginia Supreme Court Rules fail to give appropriate notice to litigants. Counsel's belief that the "Assignments of Error" was the proper document to file was based on a rational reading of the Virginia Supreme Court Rules. The Commonwealth, however, offered a different, yet nonetheless rational reading of the rules. These equally tenable, albeit conflicting interpretations of the Virginia Supreme Court Rules indicate that the rules fail to give appropriate notice to litigants, thus rendering the dismissal ineffec-

tive as an adequate state procedural bar precluding this Court's review. See James v. Kentucky, 466 U.S. 341, 348-49 (1984) (only firmly established state procedural rules interpose a bar to the adjudication of federal constitutional claims by this Court).

Prior to 1985, there was substantial confusion surrounding the proper place to appeal a denial of a habeas corpus petition in Virginia. At least in non-capital cases, final decisions in habeas corpus matters, were appealable as of right to the Court of Appeals, and further review after a Court of Appeals decision was by Petition for Appeal to the Virginia Supreme Court. See Titcomb v. Wyant, 228 Va. lvii, 323 S.E.2d 800 (1984); Peterson v. Bass, 2 Va. App. 314, 343 S.E.2d 475, 477-78 (Va. Ct. App. 1986). In 1985, the Virginia legislature amended Virginia Code § 17-116.05:1(B) to make habeas corpus decisions in capital cases appealable directly to the Virginia Supreme Court. Subsection (B) now provides:

> In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order, or judgment of the State Corporation Commission, and from proceedings under §§ 54.1-3935 and 54.1-3937. Complaints of the Judicial Inquiry and Review Commission shall be filed with the Supreme Court of Virginia. The Court of Appeals shall not have jurisdiction over any cases or proceedings described in this subsection.

The underscored language is that added by the 1985 amendment. 1985 Va. Acts C.371.

The words of the statute -- "appeals lie directly to the Supreme Court" -- suggest an appeal as of right, rather than a discretionary Petition for Appeal. Moreover, every other kind of case listed in subsection B -- convictions in death penalty cases, final decisions of the State Corporation Commission, and attorney disciplinary proceedings -- is an appeal "of right" to the Virginia Supreme Court. See, e.g., Howell v. State Corp. Comm'n, 214 Va. 128, 198 S.E.2d 611 (1973) (per curiam); Va. Code Ann. § 17-110.1.

Rule 5:17 of the Virginia Supreme Court provides: "In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed . . . ." However, Rule 5:17 is not universal as no Petition for Appeal is required in any of the other kinds of appeals mentioned in Subsection (B). Va. Sup. Ct. R. 5:21, :22. Counsel therefore reasonably concluded that the kinds of appeals mentioned in Subsection (B) -- appeals as of right from the Virginia Circuit Courts to Virginia Supreme Court -- constituted an exception to the generalized requirement of Rule 5:17.

The Virginia Supreme Court, however, interpreted the Rules differently. Although petitioner accepts the Virginia Supreme Court's statement as decisive regarding its own jurisdiction, the ambiguity of the Rules precludes their operation as a bar to this Court's jurisdiction to review the merits of O'Dell's claim. James v. Kentucky, 466 U.S. at 348-49.

Additionally, as O'Dell complied with the purpose of the Petition for Appeal by giving the Virginia Supreme Court notice of its arguments on appeal to that Court, the application of the procedural rule was pointlessly severe, and consequently incompetent as a jurisdictional bar to review. NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964).

As the Virginia Supreme Court's dismissal of O'Dell's habeas petition rests on an inadequate and insufficient state ground, we submit that this Court has jurisdiction to review the merits of O'Dell's claims presented in this petition.

CONCLUSION

For all of the reasons stated herein, Petitioner Joseph O'Dell, III respectfully requests that his petition for a Writ of Certiorari be granted to review the orders of the Virginia Supreme Court.

Dated: New York, New York
September 3, 1991

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-5655

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

CHARLES E. THOMPSON, Warden
Mecklenberg Correctional Center,
Boydton, Virginia; EDWARD W. MURPHY,
Director, Virginia Department of Corrections;
MARY SUE TERRY, Attorney General of the
Commonwealth of Virginia; and the
COMMONWEALTH OF VIRGINIA,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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September 3, 1991

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APPENDIX A

Relevant Statutory Provisions

Code of Virginia

Habeas Corpus.

§ 8.01-654. When and by whom writ granted; what petition to contain.

A. The writ of habeus corpus ad subjiciendum shall be granted forthwith by any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97 of this Code, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition, only the circuit court of the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to be served subsequently to the sentence currently being served by petitioner.

to be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground. (Code 1950, § 8-596; 1958, c. 215; 1968, c. 487; 1977, c. 617; 1978, c. 124.)

§ 17-116.05:1. Petitions for appeal; cases over which Court of Appeals does not have jurisdiction. A. Any aggrieved party may present a petition for appeal to the Court of Appeals from (i) any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed, (ii) any final decision of a circuit court on an application for a concealed weapons permit pursuant to subsection D of § 18.2-308 or (iii) any final order of a circuit court involving involuntary treatment of prisoners pursuant to § 53.1-40.1. The Commonwealth or any county, city or town may petition the Court of Appeals for an appeal pursuant to this subsection in any case in which such party previously could have petitioned the Supreme Court for a writ of error under § 19.2-317. The Commonwealth may also petition the Court of Appeals for an appeal in a criminal case pursuant to § 19.2-398.

B. In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus, from any final finding, decision, order, or judgment of the State Corporation Commission, and from proceedings under §§ 54.1-3935 and 54.1-3937. Complaints of the Judicial Inquiry and Review Commission shall be filed with the Supreme Court of Virginia. The Court of Appeals shall not have jurisdiction over any cases or proceedings described in this subsection. (1984, c. 701; 1985, c. 371; 1987, cc. 707, 710; 1988, c. 873)

§ 19.2-169.5. Evaluation of sanity at the time of the offense; disclosure of evaluation results. A. Raising issue of sanity at the time of offense; appointment of evaluators. If, at any time before trial, the court finds, upon hearing evidence or representations of counsel for the defendant, that there is probable cause to believe that the defendant's sanity will be a significant factor in his defense and that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant's sanity at the time of the offense and, where appropriate, to assist in the development of an insanity defense. Such mental health expert shall be (i) a psychiatrist, a licensed clinical psychologist, a licensed psychologist registered with the Board of Psychology with a specialty in clinical services, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services and (ii) qualified by specialized training and experience to perform forensic evaluations. The defendant shall not be entitled to a mental health expert of his own choosing or to funds to employ such expert.

B. Location of evaluation. The evaluation shall be performed on an outpatient basis, at a mental health facility or in jail, unless the court specifically finds that outpatient services are unavailable, or unless the results of the outpatient evaluation indicate that hospitalization of the defendant for further evaluation of his sanity at the time of the offense is necessary. If either finding is made, the court, under authority of this subsection, may order that the defendant be sent to a hospital designated by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services as appropriate for evaluation of the defendant under criminal charge. The defendant shall be hospitalized for such time as the director of the hospital deems necessary to perform an adequate evaluation of the defendant's sanity at the time of the offense, but not to exceed thirty days from the date of admission to the hospital.

C. Provision of information to evaluators. The court shall require the party making the motion for the evaluation, and such other parties as the court deems appropriate, to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) copy of the warrant or

indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant and the judge who appointed the expert; (iii) information pertaining to the alleged crime, including statements by the defendant made to the police and transcripts of preliminary hearings, if any; (iv) a summary of the reasons for the evaluation request; (v) any available psychiatric, psychological, medical or social records that are deemed relevant; and (vi) a copy of the defendant's criminal record, to the extent reasonably available.

D. The report. The evaluators shall prepare a full report concerning the defendant's sanity at the time of the offense, including whether he may have had a significant mental disease or defect which rendered him insane at the time of the offense. The report shall be prepared within the time period designated by the court, said period to include the time necessary to obtain and evaluate the information specified in subsection C.

E. Disclosure of evaluation results. The report described in subsection D shall be sent solely to the attorney for the defendant and shall be deemed to be protected by the lawyer-client privilege. However, the Commonwealth shall be given the report, the results of any other evaluation of the defendant's sanity at the time of the offense, and copies of psychiatric, psychological, medical, or other records obtained during the course of any such evaluation, after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence pursuant to § 19.2-168. (1982, c. 653; 1986, c. 535; 1987, c. 439.)

Rule 5:9. Notice of Appeal.

(a) *Timeliness.* No appeal shall be allowed unless, within 30 days after the entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

(b) *Content.* The notice of appeal shall contain a statement whether any transcript or statement of facts, testimony and other incidents of the case will be filed. In the event a transcript is to be filed, the notice of appeal shall certify that a copy of the transcript has been ordered from the court reporter who reported the case.

(c) *Separate Cases.* Whenever two or more cases were tried together in the trial court, one notice of appeal and one record may be used to bring all of such cases before this Court even though such cases were not consolidated by formal order.

Rule 5:17. Petition for Appeal.

(a) *Time for Filing.* In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court:

(1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from; or

(2) in the case of an appeal from the Court of Appeals, within 30 days after entry of judgment appealed from or a denial of a petition for rehearing.

(b) *Copy to Opposing Counsel.* At the time the petition for appeal is filed, a copy of the petition shall be served on counsel for the appellee.

(c) *Form and Content.* The petition for appeal shall contain assignments of error. The form and contents of the petition for appeal shall conform in all respects to the requirements of the opening brief of appellant (Rule 5:27). Four copies shall be filed. Carbon copies are acceptable. Except by leave of a justice of this Court, a petition for appeal shall not exceed 35 typed or 25 printed pages. The provisions of Rule 5:25 shall apply to limit the questions upon which this Court will rule on appeal. Only errors assigned in the petition for appeal will be noticed by this Court. Where appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to questions presented in the Court of Appeals and assignments of error relating to action of the Court of Appeals may be included in the petition for appeal to this Court.

(d) *Single Petition in Separate Cases.* Whenever two or more cases were tried together in the court or commission below, one petition for appeal may be used to bring all such cases before this Court even though the cases were not consolidated below by formal order.

(e) *Required Certificate.* The appellant shall include within the petition for appeal a certificate stating:

(1) the names of all appellants and appellees, the names, addresses, and telephone numbers of counsel for each party, and the address and telephone numbers of any party not represented by counsel;

(2) that a copy of the petition for appeal has been mailed or delivered on the date stated therein to all opposing counsel and all parties not represented by counsel;

(3) in a criminal case, a statement whether counsel for defendant has been appointed or privately retained; and

(4) whether he desires to state orally to a panel of this Court the reasons why his petition for appeal should be granted, and, if so, whether he wishes to do so in person or by conference telephone call.

(f) *Filing Fee.* The petition must be accompanied by a check or money order payable to the clerk of this Court for the amount required by statute. The statutory fee shall be collected at the time such petition is presented and the clerk of this Court shall not file a petition that is not accompanied by such fee.

(g) *Oral Argument.* The appellant shall be entitled to state orally, in person or by conference telephone call, to a panel of this Court the reasons why his petition for appeal should be granted. The appellant may waive the right to oral argument on the petition for appeal before a panel by notifying the clerk of this Court and opposing counsel in writing, or by filing a reply brief.

Rule 5:21. Special Rules Applicable to Appeals From the State Corporation Commission.

(a) *Applicability.* This Rule applies to all appeals from the State Corporation Commission and supersedes all other Rules except as otherwise specified herein.

(b) *Party.* For the purposes of this Rule, the Commission, the Attorney General, the applicant or petitioner, and every person who made an appearance in person in a capacity other than as a witness or by counsel at any hearing in any proceeding before the Commission shall be the parties to such proceeding. Upon the request of any party, the clerk of the Commission shall prepare and certify a list of all parties (including their addresses and the names and addresses of their counsel) to a proceeding before the Commission. Initially, the parties to an appeal from an order in a proceeding shall be the parties to that proceeding, but the number of parties to an appeal may thereafter be limited as hereinafter provided. Service upon a party represented by counsel shall be made upon his counsel.

(c) *Notice of Appeal.* No appeal from an order of the Commission shall be allowed unless, within 30 days after entry of the order appealed from, counsel files in the office of the clerk of the Commission a notice of appeal, a copy of which has been mailed or delivered to each party to the appeal and appended to which is either an acceptance of such service or a certificate showing the date of delivery or mailing. All appeals from the same order shall be deemed to be a single consolidated case in this Court unless this Court shall order a severance for convenience of hearing.

(d) *Record.* The clerk of the Commission shall prepare and certify the record as soon as possible after the notice of appeal is filed and shall, as soon as it has been certified by him, transmit it to the clerk of this Court within 4 months after entry of the order appealed from. In the event of multiple appeals in the same case or in cases tried together below, only one record need be prepared and transmitted.

(e) *Contents of Record.* The record on appeal from the Commission shall consist of all notices of appeal, any application or petition, all orders entered in the case by the Commission, the opinions, the transcript of any testimony received, and all exhibits accepted or rejected,

together with such other material as may be certified by the clerk of the Commission to be a part of the record. The record shall conform as nearly as practicable to the requirements of Rule 5:10.

(f) *Alignment of Parties.* Within 21 days after the notice of appeal shall have been filed in the office of the clerk of the Commission, each party who has not filed a notice of appeal and who intends to participate in the appeal shall file in the office of the clerk of the Commission and shall mail to every other party a notice that he intends to participate as an appellant or as an appellee. Every party who seeks reversal or modification of the order appealed from shall be deemed an appellant, and every party who seeks affirmance of the order appealed from shall be deemed an appellee. Every party who does not file such a notice and every party who, having filed such a notice as an appellant, does not thereafter file a petition for appeal shall be deemed no longer to be a party to the appeal, and no further papers need be served on him. Notwithstanding the foregoing provisions, (1) a necessary party who does not file such a notice or petition for appeal shall be deemed an appellee, and (2) the Commission need not file such a notice and shall be deemed an appellee.

(g) *Petition for Appeal.* The petition(s) for appeal shall be filed in the office of the clerk of this Court within 4 months after entry of the final order, judgment or finding by the Commission. Each party deemed to be an appellant shall file a petition for appeal and shall, before the petition is filed, mail or deliver a copy to every other party to the appeal. Except as provided herein, the provisions of Rule 5:17 do not apply to a petition filed pursuant to this paragraph. The petition for appeal need only identify the order appealed from, with its date, contain a prayer that the appeal be granted, and include the certificate required by Rule 5:17(d)(1), (2) and (4). Oral argument on the petition shall not be allowed nor will a brief in opposition be received. If the petition prays for a suspension of the effectiveness of the order appealed from, it shall contain such statements of the facts and argument as shall be necessary for an understanding of the question presented. In that event, a brief opposition will be received and oral argument may be granted.

(h) *Award of Appeal.* When the notice of appeal, the record, and the petition(s) for appeal appear to have been filed in the manner provided herein and within the time

provided herein and by law, the clerk of this Court shall forthwith enter an order granting the appeal, requiring such bond as he shall deem proper. His action shall be subject to review by this Court.

(i) *Assignments of Error.* Within 10 days after the issuance by the clerk of this Court of his certificate pursuant to Rule 5:23, each party appellant shall file assignments of error in the office of the clerk of this Court and mail a copy thereof to every other party to the appeal. Only errors so assigned will be noticed by this Court and no error not so assigned will be admitted as the ground for reversal of the decision below. Error will not be sustained to any ruling by the Commission unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. An assignment of error which merely states that the judgment is contrary to the law and the evidence is not sufficient.

(j) *Further Proceedings.* Further proceedings in this Court shall conform to Rules 5:23 through 5:40 provided that (i) the time within which the appellee may file with the clerk of this Court a designation of the additional parts of the record that he wishes included in the appendix (Rule 5:32(d)) shall be extended to 30 days after the date of the certificate of the clerk of this Court pursuant to Rule 5:23 an appeal has been awarded; and (ii) the time within which the opening brief of the appellant shall be filed in the office of the clerk of this Court shall be extended to 50 days after such date.

(k) *Additional Brief.* An appellant who seeks relief different from that sought by another appellant may file an answering brief at the time prescribed for filing the brief of appellee.

Rule 5:22. Special Rule Applicable to Cases in Which Sentence of Death Has Been Imposed.

(a) Upon receipt of a record pursuant to § 17-110.1 B, the clerk of this Court shall notify in writing counsel for the accused in the circuit court (who shall be deemed to be counsel for the appellant), the Attorney General (who shall be deemed to be counsel for the appellee), and the Director of the Department of Corrections of the date of its receipt (the Filing Date). The case shall thereupon stand matured as if an appeal had been awarded to review the conviction and the sentence of death, and the notice issued by the clerk of this Court shall be deemed to be the certificate of the clerk of this Court pursuant to Rule 5:23 that an appeal has been awarded, and the enforcement of the sentence of death shall thereby be stayed pending the final determination of the case by this Court.

(b) Within 10 days after the Filing Date, counsel for the appellant shall file with the clerk of this Court assignments of error upon which he intends to rely for reversal of the conviction or review of the sentence of death. He shall accompany the assignments of error with a designation of the parts of the record relevant to the review and to the assignments of error. Not more than 10 days after such assignments of error and designation are filed, counsel for the appellee may file with the clerk of this Court a designation of the additional parts of the record that he wishes included as germane to the review or to any assignments of error. Counsel for the appellant shall include in the appendix the parts so designated. The provisions of Rules 5:31 and 5:32 (except Rule 5:32(d)) shall apply to the appendix.

(c) With respect to the sentence of death, it shall be a sufficient assignment of error to state that the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor or that the sentence is excessive or disproportionate to the penalty imposed in similar cases.

(d) Except to the extent that a conflict with this Rule may arise (and this Rule shall then be controlling), further proceedings in the case shall conform to the Rules relating to cases in which an appeal has been perfected.

(e) This Court may, on motion in a particular case, vary the procedure prescribed by this Rule in order to attain the ends of justice and the purpose of § 17-110.1.

CLAIMS RAISED IN O'DELL'S SECOND AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

I. O'DELL WAS PREJUDICED BY THE ADMISSION OF IMMATERIAL AND IRRELEVANT EVIDENCE OF AN UNRELATED CRIME

II. O'DELL WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

A. O'Dell Was Not Competent to Represent Himself at Trial

B. There Was No Constitutionally Valid Waiver of O'Dell's Right to Counsel

1. The Failure to Appoint a Psychiatrist Qualified by Training and Experience to Conduct Evaluations Violated Virginia Laws and Due Process

2. The Competency "Evaluation" To Determine Whether O'Dell Was Competent To Waive The Right To Counsel Knowingly And Intelligently Was Constitutionally Insufficient

3. O'Dell's Purported Waiver Was Made In Ignorance of the Dangers and Disadvantages of Self-Representation

4. O'Dell's Purported Waiver Was Involuntary

C. Ray Failed to Ensure that O'Dell was properly Evaluated

D. The Court Failed To Fulfill Its Continuing Obligation To Monitor O'Dell's Competence To Continue Pro Se

E. O'Dell Was Incompetent to Represent Himself at the Penalty Phase

F. O'Dell Was Unconstitutionally Denied the Resources Necessary to Represent Himself

G. Standby Counsel Was Unable To Render Effective Assistance

H. The Denial of O'Dell's Constitutional Right to Effect Assistance of Counsel Resulted in Prejudice

III. O'DELL WAS DENIED BOTH HIS RIGHT TO REBUT MISLEADING AGGRAVATING EVIDENCE AND HIS RIGHT TO PRESENT CRUCIAL MITIGATING EVIDENCE OF HIS INELIGIBILITY FOR PAROLE, THEREBY RENDERING THE SENTENCE INHERENTLY UNRELIABLE

A. The Jury Was Wrongfully Precluded From Considering The Mitigating Evidence Of O'Dell's Ineligibility For Parole

B. Exclusion Of Evidence Of O'Dell's Ineligibility For Parole Precluded Him From Rebutting The Commonwealth's Misleading Aggravating Evidence Falsely Implying That O'Dell Would Be Paroled If Given Life

C. Excluding Evidence Of Parole Ineligibility Unconstitutionally Thwarted The Jury's Exercise Of Discretion

IV. THE COMMONWEALTH UNCONSTITUTIONALLY THWARTED O'DELL'S ABILITY TO CHALLENGE THE SCIENTIFIC EVIDENCE BROUGHT AGAINST HIM

A. The Court Erred In Admitting Electrophoretic Evidence

B. The Commonwealth Failed To Show The Reliability Of The Test Performed By Emrich

C. Emrich's Technique In Performing The Scientific Testing Fell Below The Applicable Standard of Care

D. The Commonwealth's Failure To Preserve Evidence For Retesting Violated Due Process And Constituted Bad Faith

E. In Denying O'Dell an Ex Parte Hearing In Which To Make His Preliminary Showing Of Need, The Trial Court Forced O'Dell To Reveal His Trial Strategy To the Prosecution

F. The Trial Court's Failure To Provide Reciprocal Discovery To The Defendant Violated His Due Process Rights

G. The Court's Refusal To Limit The Commonwealth's Number Of Experts Or, in the Alternative, To Grant A Continuance So That Benjamin Grunbaum Could Testify, Deprived O'Dell Of Due Process

H. In Restricting O'Dell's Cross-Examination Of Dr. Sensabaugh, the Commonwealth's Cross-Examination Violated O'Dell's Sixth Amendment Confrontation Right

I. The Trial Court's Refusal To Limit Dr. Guth's Testimony To Those Sections Of His Report Dealing With Serology Deprived O'Dell Of His Right To Assistance Of An Expert

V. O'DELL'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT WAS BASED UPON AGGRAVATING FACTORS THAT FAILED ADEQUATELY TO GUIDE THE SENTENCER'S DISCRETION

A. Virginia's "Vileness" Aggravating Factor Is Unconstitutionally Vague As Applied

B. Virginia's "Future Dangerousness" Aggravating Factor Is Unconstitutionally Vague As Applied

VI. THE TRIAL COURT FAILED PROPERLY TO INSTRUCT THE JURY THAT IT HAD TO BE UNANIMOUS AS TO EACH AGGRAVATING FACTOR

VII. THE TRIAL COURT'S PENALTY PHASE INSTRUCTIONS WERE CONSTITUTIONALLY INADEQUATE

VIII. O'DELL WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT AND EFFECTIVELY CROSS-EXAMINE WATSON

IX. O'DELL'S CONVICTION AND DEATH SENTENCE CANNOT STAND BECAUSE THE EVIDENCE ON WHICH THEY ARE BASED IS CONSTITUTIONALLY INSUFFICIENT AND PATENTLY UNRELIABLE

X. THE COMMONWEALTH'S FAILURE TO PRODUCE DISCOVERABLE EXCULPATORY EVIDENCE DENIED O'DELL HIS RIGHTS UNDER THE DUE PROCESS CLAUSE AND THE CONSTITUTION OF VIRGINIA

XI. THE COURT FAILED TO ENSURE THAT O'DELL'S VERDICT AND SENTENCE WOULD BE RENDERED BY AN IMPARTIAL JURY UNPREJUDICED BY EXTRANEOUS INFLUENCES

A. A Change of Venue Should Have Been Granted

B. The Jury Should Have Been Sequestered

XII. REPEATED STATEMENTS THAT THE JURORS' ROLE WAS TO "RECOMMEND" THE SENTENCE VIOLATED BOTH VIRGINIA AND FEDERAL LAW

XIII. O'DELL'S CONSTITUTIONAL RIGHT TO A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY IN THE VENIRE WAS VIOLATED

XIV. THE WRONGFUL RETENTION OF BIASED JURORS AND THE WRONGFUL EXCLUSION OF QUALIFIED JURORS VIOLATED O'DELL'S RIGHTS UNDER THE FOURTEENTH AMENDMENT AND UNDER WITHERSPOON v. ILLINOIS

A. Thurston, Foust, Villandre and Kelly Were Wrongfully Retained In Violation Of The Fifth and Fourteenth Amendments

B. The Exclusion of Venirepersons Violated O'Dell's Right To A Fair Cross-Section Of The Community

XV. VOIR DIRE QUESTIONS TO ELIMINATE THOSE WITH SCRUPLES AGAINST THE DEATH PENALTY WERE MORE FAIRLY DEVELOPED THAN QUESTIONS TO DETECT PREJUDICE IN FAVOR OF THE DEATH PENALTY

XVI. THE JURY WAS PERMITTED TO CONSIDER DURING THE PENALTY PHASE EVIDENCE SO UNRELIABLE OR IRRELEVANT THAT THE RESULTING DEATH PENALTY MUST BE REVERSED

XVII. ELECTROCUTION IS CRUEL AND UNUSUAL PUNISHMENT

XVIII. O'DELL'S DEATH SENTENCE MAY NOT BE CARRIED OUT BECAUSE HE HAS NEVER BEEN ADEQUATELY EVALUATED AS FREE OF MENTAL ILLNESS

XIX. BY ARBITRARILY APPLYING PROCEDURAL RULES TO BAR CONSIDERATION OF CONSTITUTIONAL INFIRMITIES IN O'DELL'S TRIAL, THE SUPREME COURT OF VIRGINIA EVADED ITS FUNDAMENTAL OBLIGATION TO ENSURE THE DEATH PENALTY WAS NOT UNCONSTITUTIONALLY APPLIED IN THIS CASE

XX. O'DELL WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

XXI. O'DELL'S CONVICTION MUST BE VACATED BECAUSE IT WAS OBTAINED THROUGH THE USE OF PERJURED TESTIMONY

XXII. O'DELL'S CONVICTION AND DEATH SENTENCE MUST BE REVERSED BECAUSE OF THE COMMONWEALTH'S FAILURE TO ESTABLISH THE CHAIN OF CUSTODY OF EVIDENCE INTRODUCED AT TRIAL

XXIII. THE PSYCHIATRIC "EVALUATION" OF O'DELL AS TO HIS COMPETENCY TO STAND TRIAL AND HIS MENTAL STATE AT THE TIME OF COMMISSION OF THE ALLEGED OFFENSE WAS CONSTITUTIONALLY INADEQUATE AND VIOLATED THE VIRGINIA STATUTES GOVERNING SUCH EVALUATIONS

A. The "Evaluation" to Determine Whether O'Dell Was Competent to Stand Trial Was Inadequate and Violated Virginia Law

B. The "Evaluation" to Determine O'Dell's Sanity At the Time of the Alleged Offense Was Inadequate and Violated Virginia Law

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

JOSEPH ROGER O'DELL, III,

Petitioner,

v. At Law No. CL89-1475

CHARLES H. THOMPSON, Warden, Mecklenburg Correctional Center Boydton, Virginia; EDWARD W. MURRAY, Director, Virginia Department of Corrections; MARY SUE TERRY, Attorney General of the Commonwealth of Virginia; and the COMMONWEALTH OF VIRGINIA,

Respondents.

ORDER

This Court, having considered the amended petition for a writ of habeas corpus, the motion and the supplemental motion to dismiss of the respondents, the memorandum and supplemental memorandum in opposition to the motion to dismiss, the response to the petitioner's memorandum and the motions for DNA testing and for a psychological evaluation of the petitioner to both of which the respondents consent, and this Court having taken testimony and heard argument on these matters on August 22, 1989, finds that the following claims in the petition for a writ of habeas corpus will be denied because they were not raised at trial and on appeal in violation of the principles enunciated in Slayton v. Parrigan, 215 Va. 27 (1974):

IIA(2). Paragraphs 163 through 165 alleging that the trial court improperly failed to monitor the performance of petitioner acting as his own counsel;

V. Paragraphs 220 through 229 alleging that the aggravating factors of vileness and future dangerousness are unconstitutionally vague;

VI. Paragraphs 230 through 234 alleging that the jury was improperly instructed that it had to be unanimous as to each aggravating factor;

X. Paragraph 263 alleging that the Commonwealth failed to disclose exculpatory statements by David Pruett;

XI. Paragraphs 265 through 271 alleging that a change of venue should have been granted and that the jury should have been sequestered;

XIV. Those parts of paragraphs 281 through 283 alleging that venirepersons Kelly and Thornton were improperly retained;

XVII. Paragraphs 296 through 297 alleging that electrocution is cruel and unusual punishment.

The court finds on the basis of the aforementioned pleadings and proceedings that the following allegations will be denied because they were previously considered by the Supreme Court of Virginia on petitioner's direct appeal. Hawks v. Cox, 211 Va. 91 (1970):

I. Paragraphs 136 through 142, alleging that immaterial and irrelevant evidence of an unrelated

crime was admitted;

IIA(I). Paragraphs 155 through 157 alleging that the trial court failed to provide appropriate warnings about self-representation to the petitioner;

IIA(1). Paragraph 159 alleging that petitioner's original attorney was improperly permitted to withdraw;

IIA(3). Paragraphs 166 through 168 alleging that the petitioner was denied the resources necessary to represent himself;

III. Paragraphs 179 through 191 alleging that petitioner was improperly refused an opportunity to advise the jury that he would be ineligible for parole;

IVA. Paragraphs 193 through 195 alleging that the court improperly admitted electrophoretic evidence;

IVC. Paragraphs 200 through 203 claiming that tests were not performed with appropriate scientific testing controls;

IVD. Paragraphs 203 through 204 alleging that the Commonwealth failed to preserve evidence;

IVE. Paragraphs 205 through 206 alleging that petitioner was improperly denied ex parte hearings;

IVF. Paragraphs 207 through 210 alleging that the petitioner was improperly denied reciprocal

discovery;

IVG. Paragraphs 211 through 213 alleging that the Court improperly refused to limit the number of experts for the Commonwealth;

IVH. Paragraphs 214 through 216 alleging that the petitioner was improperly restricted in his cross-examination of a prosecution witness;

IVI. Paragraphs 217 through 219 claiming that the Court improperly refused to limit the testimony of the petitioner's expert;

VII. Paragraphs 235 through 241 alleging that the penalty phase instructions were constitutionally inadequate;

VIII. Paragraphs 242 through 247 alleging that the Court improperly restricted cross-examination of the witness Watson;

IX. Paragraphs 250 through 255 claiming that the testimony at trial of the witnesses Watson, Craig and Christianson was unreliable;

X. Paragraph 262 alleging that the Commonwealth improperly failed to produce exculpatory evidence with respect to the witness Watson;

XII. Paragraphs 272 through 276 alleging that the trial court improperly advised the jury that its role was

to recommend a sentence;

XIII. Paragraphs 277 through 280 claiming that the jury panel was not a valid cross-section of the community;

XIV. Those parts of paragraphs 281 through 285 alleging that venirepersons Thurston, Villandre, and Foust were improperly retained or that venirepersons McClellan, Fiutko, and Jones were improperly excluded from the panel;

XV. Paragraphs 286 through 290 claiming that the voir dire questions were improperly slanted towards the death penalty;

XVI. Paragraphs 291 through 295 alleging that improper and unreliable evidence was introduced at the penalty phase;

XIX. Paragraphs 302 through 310 claiming that the Supreme Court improperly applied its procedural rules;

The Court also dismisses, without prejudice, claim XVIII, set forth in paragraphs 298 through 301, which alleges that petitioner is presently insane so that his execution would be unconstitutional because to this point petitioner has not produced any evidence to support that claim.

This Court dismisses claim XX, set forth in paragraphs 310A through 310D, alleging that petitioner was denied effective assistance of counsel on appeal, because the petitioner has failed

to demonstrate any prejudice based on the alleged ineffectiveness.

The Court also dismisses paragraphs 176 through 178 of claim IIB alleging that the status and duties of stand-by counsel prevented effective assistance, and that portion of claim IIA which states in paragraph 148(c) that the petitioner's waiver of counsel was constitutionally invalid because his stand-by counsel was inexperienced, unprepared, and ineffective because petitioner waived his Sixth Amendment right to counsel.

The Court retains that portion of claim II(A)1, set forth in paragraphs 149 through 154 and 160 through 162, and claim II(A)4, set forth in paragraphs 169 through 175, which allege that petitioner's waiver of his right to effective assistance of counsel was invalid, pending psychiatric and neurological evaluation of petitioner, whose transportation to Staunton Correctional Facility on September 29, 1989 and Buckingham Correctional Facility on October 25, 1989 has been ordered by separate orders upon the consent of respondents (Tr. 47, 58).

The Court further retains that portion of claim IX, set forth in paragraph 256, which alleges that on the basis of cumulative error the serological evidence at trial was unreliable pending the performance of the DNA testing ordered by separate order on the consent of the respondents and that portion of claim IV, (IVB), paragraphs 196 through 199, alleging that the trial court improperly found the test performed by Emrich to be reliable.

Discovery relating to competency and DNA may proceed after

consultation between counsel (Tr. 100-01). New evidence or discovery to permit new evidence will only be permitted as to these two claims.

The Clerk shall send a copy of this order to counsel for the petitioner and counsel for the respondents.

ENTER: 1/31/90

JUDGE

I ask for this:

Counsel for Respondents

Seen and objected to:

Counsel for Petitioner

Counsel for Petitioner

Counsel for Petitioner

Certified to be a TRUE COPY
of record in my custody.
J Curtis Fruit, Clerk
Custodian
BY Deputy Clerk

COPY RECEIVED
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
☐ By Hand ☒ By Mail
By [illegible] Date: Feb 1, 1990
Date Feb 6, 1990 Time

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOSEPH ROGER O'DELL, III,
Petitioner,

v

CHARLES E. THOMPSON, Warden, Mecklenburg Correctional Center, Boydton, Virginia, et al,
Respondents.

RECORD

CASE NO. CL89-1475

Stenographic transcript of testimony introduced and proceedings had upon the hearing of the above-entitled cause in said court on August 22, 1989, before the Honorable H. Calvin Spain, judge of said court.

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APPEARANCES: Mr. Andrew R. Sebok, Mr. Steven B. Rosenfeld and Mr. John P. Coffey, attorneys for the petitioner.

Mr. Eugene Murphy, Assistant Attorney General.

that's not without a showing of prejudice. That is, we don't have any claim. As a matter of fact, most of the assignments of error are just that. All we have now is that certain assignments of error were not raised.

There's no claim that these are meritorious issues. There's no claim that they would have resulted in a reversal. No showing that what the attorney did at the appellate stage somehow changed the outcome. That if he had in fact raised some of these issues he thought not meritorious at that point, that the conviction would have been reversed. I think for that reason the claim of ineffectiveness of counsel should also be dismissed, and with that I'll rest.

MR. ROSENFELD: Your Honor, I want to start, because this is always uppermost in my mind, by just stating to Your Honor and for the record that I come here before Your Honor representing Mr. O'Dell who insists to this day that he is innocent of this crime, to the point where he has moved -- and if Your Honor will remember, he made the motion and then withdrew it because we were going to make it, but he made the motion for the DNA testing, to submit the forensic of evidence to this new DNA procedure.

An article just recently published in the Virginia Law Review said the theory underlying DNA

typing is so well accepted that its accuracy is unlikely even to be raised as an issue. So I'm driven by that. I want Your Honor to know where I'm coming from on this. I don't say that it is really relevant, but I did want to start off by saying that to Your Honor.

Your Honor, Mr. Murphy said he was surprised when he first came to Virginia that the Virginia habeas corpus procedure is so narrow and he thinks that other lawyers are surprised by that; and it may be narrow, Your Honor, but in a case coming from the state just this term, the Giarratano case, where the Supreme Court reversed the Forth Circuit on other grounds in a plurality opinion. Justice Kennedy in a concurring opinion joined by Justice O'Connor did say, "Collateral relief proceedings are a central part of the review process for prisoners sentenced to death."

And a case which Mr. Murphy cites in his brief, Lacey against Palmer, in 1896 did say, "While the office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner, it is to determine whether or not he's restrained of his liberty by due process of law."

Your Honor, the main issues that are presented on a petition for writ of habeas corpus are due process

issues. They are issues that raise certain questions of due process. We have already addressed the issue of his competency to represent himself which is certainly a central issue of due process, and the question that we hope will be solved by DNA testing is whether the complex of questions that are raised in the petition having to do with the forensic evidence that was a central part of the state's case against Mr. O'Dell that is to link Mr. O'Dell to the heinous crime.

Your Honor will remember that Mr. Test in his summation before the jury at the trial spent a lot of time on how awful the crime was, and there's no doubt that it was an awful crime, but he spent very little time on what proof he had that it was Mr. O'Dell that committed this heinous crime, and the central evidence that linked Mr. O'Dell to the crime was the analysis of the blood; and if the DNA testing goes the way we think it's going to go and hope it's going to go, then I think that does raise a question of whether or not the reliability of that forensic evidence at this trial and the limitations placed on the cross-examination and all of the things that are raised in the petition are due process issues so that these thing are properly before the Court.

And that leads me to the other things that I want to address because, Your Honor, I do believe that in this case the Commonwealth is placing far more weight on Slayton against Parrigan and Hawks against Cox than reading those decisions would justify; and to illustrate that, I want to concentrate on just two of the other claims that are in the petition. There are twenty of them and I don't want to take Your Honor's time going through all twenty although the points I'm going to make apply to all twenty, but I want to address the two of them.

One is the first claim in the petition having to do with the testimony of the Reverend Christianson and the other one having to do with the issue which Your Honor, according to the record during the voir dire of the jury, recognized might become a very key issue in the case and ultimately did become a key issue at the sentencing phase which is whether or not Mr. O'Dell had a constitutional right under federal cases to have the fact that if he were sentenced to life in prison that parole was an impossibility known to the jury.

THE COURT: Let me deal with the last one first. First, the only reason that -- and I think the record reflects it, I may be wrong, the only reason there was

not an instruction put in to the jury that based upon the present law that a conviction in this case would have prevented Mr. O'Dell from ever being eligible for parole was the fact the Supreme Court had handed down a decision saying it was improper.

MR. ROSENFELD: The Supreme Court of Virginia, Your Honor, had ruled that both sides ought not to comment on the likelihood or the possibility that a parole board would or would not grant parole but there --

THE COURT: What we were going to do is put an instruction in that under the existing law he was not eligible for parole based upon his prior record if he were sentenced to life in prison, and the reason that was not done was the Commonwealth just had an itch in the back of its neck and went over during lunchtime and found the case involved and came back. I mean we had a real donnybrook over it because the Commonwealth had no objection to that instruction being put in the record until that case was brought up.

MR. ROSENFELD: Your Honor, that case was a case of state law and it was a case that said neither side should be allowed to invite the jury to speculate as to what a parole board would do, but it was not a case that addressed the question of whether in a situation

where there was no -- there was no question that under the law he could not get paroled, he was not eligible for parole, that --

THE COURT: Well, therein lies the dilemma if all they had to do was change the law and the law could have been changed and he could have become eligible for parole at some future date. That was the problem.

MR. ROSENFELD: Your Honor, the point that I wanted to address was not the -- Your Honor's recollection of what happened is absolutely correct, and what I wanted to get to was the issue that's raised on this habeas issue is one of federal law under the line of Federal Supreme Court cases starting with Lockett against Ohio and going through Eddings and Skipper against South Carolina in which the Supreme Court has held that on the question of future dangerousness the jury is entitled to know every fact that is relevant to the question of whether or not the defendant is going to be a danger to society in the future; and that where the prosecution relies on a prediction of future dangerousness in asking for the death penalty, and there's no doubt that the prosecutor did here -- He on the penalty phase brought out Mr. O'Dell's record and the fact that he had been in and out of penitentiaries in this state and Florida.

And he said to them in his last words on the penalty phase, No prison has ever been able to stop Mr. O'Dell. There's only one thing that's going to stop him. And what he was arguing is that he's been in and out of prison before and he could be in and out again unless you sentence him to death.

The Supreme Court has held that where the prosecution asks for that, the defendant is entitled as a matter of federal constitutional right to introduce any evidence that could possibly lead a reasonable jury to conclude that that is unlikely and certainly --

THE COURT: Well, did you also manage to read in his record that he was involved in the -- I believe the demise of a prisoner in a Virginia correctional institution while he was incarcerated earlier in his career?

MR. ROSENFELD: Yes, I've heard that, Your Honor, and that is something the jury could consider; but the jury was entitled to everything --

THE COURT: As I recall, he killed somebody and was prosecuted for it while being a prisoner in a state institution. Powhatan if I remember correctly.

MR. ROSENFELD: It's up to the jury to determine what they wanted to give to that as -- but they were entitled to know, our argument is, and I think it's a

very strong one under the line of Federal Supreme Court cases; that the jury was entitled to know everything that a rational person would want to know in deciding this question. And certainly the parole eligibility point in this case under these facts with the prosecution arguing the way it did for the death penalty was a fact that that jury under the Lockett, Skipper, Eddings line of cases was entitled to know. That's our federal claim.

The reason I dwell on it, Your Honor, that was argued on appeal and the Supreme Court ducked it. They didn't opine on it at all. They just cited two -- not the same cases that the Commonwealth came to Your Honor over the lunch hour with but two other cases, Williams and Poyner, both of which said, as I've said before, that the jury should not be invited to speculate on what a parole board may do; and they decided it's solely a question of state law, so the federal question was never considered although it was raised.

Now --

THE COURT: I'll tell you what I'm going to do for you. I'm going to dismiss it and you can let the federal boys rule on it. I think it worthy of an answer frankly. I mean that in all seriousness. I think it should be addressed as to what is permissible

in this state; and the state, as far as I'm concerned, has spoken on the subject; and I do not find the comments made by counsel in closing argument to be error or to open the door in this respect. It's a simple matter I think of a court deciding; and I think it's going to have to come in a federal court, it's not going to be a state court, that as a matter of constitutional law federalwise that these things have to be told to a jury.

MR. ROSENFELD: Just so the record is clear --

THE COURT: And frankly it ought to be spelled out by some court so that everybody knows. I mean, it really should be. Or is the defendant entitled to an instruction that under the present law if convicted or having already being convicted if he's sentenced to life imprisonment he is not eligible for parole. Is he entitled to that instruction being given to the jury; and is the Commonwealth, on the other hand, entitled to have a similar instruction given that the effect of that instruction is correct provided the law is not changed. Now if each of them has got those instructions, is it a constitutional right to submit those to the jury?

MR. ROSENFELD: That --

THE COURT: We all thought until we read the

Virginia cases that that was a reasonable request, both parties being on equal standing so the jury understood, and I'm telling you right now the decision was made because of the case law we found in the Commonwealth of Virginia not to admit that instruction.

MR. ROSENFELD: And Your Honor --

THE COURT: And I think the Supreme Court has adequately addressed it on appeal, and I see no reason to upset the apple cart at this point. If it's a federal question, then I think it's ultimately going to wind up on a federal writ, and let the federal courts rule at that point.

MR. ROSENFELD: Your Honor, then accepting the argument under Parrigan against Paragon -- I'm sorry it's a Hawks v. Cox bar --

THE COURT: I'm not categorizing it for your convenience under either category for your appellate purposes. I'm now stating that that particular matter in your writ is dismissed. I've given you the explanation as to the history behind it, why we reached the conclusion we did. I find no error in that. It was properly dealt with as far as the Court is concerned on appeal by the Supreme Court. You may deal with it in a federal writ.

MR. ROSENFELD: Your Honor, the other one that I

wanted to address, and again this is by way of example in order to address myself to the arguments that are made by the Commonwealth as to why this and other claims are barred by Slayton v. Parrigan, has to do with Reverend Christianson's testimony.

Now Your Honor will remember there was a hearing out of the presence of the jury when the Commonwealth proposed to call Christianson and then before that when they proposed to have a detective identify the clothes that were taken from the garage which Christiansen would later say were stolen or missing from his car. Your Honor had expressed at that time grave concern about where the Commonwealth was going on this and warned them that they were flirting with a mistrial and said they would have to connect those clothes up to Mr. O'Dell and the crime, and they said they were going to take the risk, and the record shows they never did that.

There was testimony from Christianson in which he talked about this being the most traumatic experience he ever went through when he came out of the hotel and found his car window smashed and all of his clothes that his wife had laid out for him gone. It was pretty dramatic testimony, and the clear implication was that Mr. O'Dell was the culprit, but

they never connected it up to this crime in any way, and so it stood as prejudicial evidence of an unrelated crime that the Commonwealth put in solely for its prejudicial effect. It had no probative value as to whether or not Mr. O'Dell was or was not the person who murdered Helen Schartner.

And even on their brief in the Supreme Court when this question was briefed, and it was briefed before the Supreme Court on exactly the same ground it was objected to in Your Honor's courtroom and a mistrial was made, that is, it was irrelevant, that it was evidence of an unrelated crime and it was prejudicial, and that's exactly the basis on which it was briefed in the Virginia Supreme Court; and the Commonwealth's only response was, Well, the fact that the clothes were stolen indicated premeditation and intent on the part of the defendant. Stealing of the clothes by the defendant indicated hours in advance, and it was really almost two days in advance, of the commission of the crime that the defendant had a sinister purpose in mind. That was their sole defense for this, Your Honor; and that's pretty flimsy because there really was no connection up.

Now this was argued to the Virginia Supreme Court on appeal on exactly the same grounds that it was

argued below, and the Supreme Court held that it was procedurally defaulted. They held that O'Dell had changed the grounds on which he argued against this from the trial to the appeal; and we show Your Honor by putting in our brief and the petition the transcript excerpts which show the grounds on which this was objected to in the trial and the brief to show that the grounds were exactly the same.

THE COURT: Well, let me ask you a question as to what you've said. Am I not being, if I follow your argument, asked to reverse the Supreme Court?

MR. ROSENFELD: No, Your Honor, you're not because the Supreme Court didn't reach the merits of this at all.

THE COURT: But the fact that the Supreme Court made a mistake -- is that something I'm supposed to reverse?

MR. ROSENFELD: Not on a substantive -- we're not asking Your Honor to disagree with them on any substantive issue of law.

THE COURT: Well, they obviously ruled on the point.

MR. ROSENFELD: But the Commonwealth argues that this is Slayton against Parrigan, and Slayton against Parrigan applies by its very terms only when something

was not raised before. This was raised. It was raised before Your Honor, it was raised on appeal, but it wasn't decided.

THE COURT: Your proper remedy there is to ask for a rehearing by the Supreme Court and to ask them to address that very issue.

MR. ROSENFELD: Your Honor, there's nothing in Slayton that suggests you can't bring something out in habeas because you didn't file a petition for rehearing. If you did raise it before and if it is a question of due process, then you've satisfied what Slayton again Parrigan says; that the evil we're trying to avoid here is a defendant who for tactical reasons tries to circumvent the trial process and appeal process by sitting on an issue and not saying anything about it at trial, not saying anything about it on appeal, and then raises it for the first time on habeas.

That's what Slayton says you can't do, and we didn't do that in this case, Your Honor. We didn't sit on this thing. We didn't circumvent the process; but it wasn't reached and, therefore, it is appropriate for Your Honor to consider it again on habeas.

THE COURT: I don't see that as necessarily the same conclusion I'd reach. It was an issue before me.

They decided the issue right or wrong You say they didn't really consider it on the same basis or they considered it on a different basis, and it seems to me that a petition for rehearing is the appropriate remedy, not for me to sit here and say the Supreme Court is a bunch of idiots. That's what you're asking me to say; that they're incompetent and didn't do it right or I have to make a decision that they didn't consider it.

MR. ROSENFELD: They didn't decide the issue. We're not asking Your Honor to decide it differently from the way they decided it. They just didn't decide it.

THE COURT: Well, they take the position they did obviously.

MR. ROSENFELD: The Commonwealth didn't even argue procedural bar before the Supreme Court

THE COURT: I know as a factual matter that the considered it. An issue raised by the defendant pled before the Supreme Court.

MR. ROSENFELD: Yes, sir, that's true, but they then said we decline to consider the issue. We decline to consider it on its merits and we decline to decide it.

THE COURT: So --

MR. ROSENFELD: Slayton against Parrigan does not prevent a habeas court from looking again at issues that were raised before but not decided. Hawks against Cox says that if an issue has been decided, then Your Honor can't decide it again, and Slayton says --

THE COURT: And you don't think they decided it in the Supreme Court?

MR. ROSENFELD: I don't think they decided the merits, no, Your Honor. They said it was procedurally barred on ground that are clearly -- that clearly is not procedurally barred and, therefore, since it was raised --

THE COURT: Why am I supposed to decide it was a mistake on their part?

MR. ROSENFELD: I don't think it was a mistake. You're not supposed to decide it was a mistake.

THE COURT: Don't I have to find it was a mistake on their part?

MR. ROSENFELD: No, you don't, Your Honor. Let me step back a minute. Habeas corpus is a property by which the Court can review what happened before and bring to bear on it due process issues. Now Hawks against Cox -- and Hawks against Cox established a rule that says that's true, and the main holding of Hawks against Cox, Your Honor, is that res judicata doesn't

apply in habeases. You're not barred by the doctrine of res judicata for something previously decided, but they said we're not going to encourage petitioners to be constantly bringing new petitions to get things decided that have already been decided. So if it's been decided, you can't get it -- talking about the merits of a claim, you can't get it decided again. Well, this hasn't been decided. The merits of this issue have not been decided.

Now Slayton against Paragon is another exception that says if the merits haven't been decided because the defendant didn't raise them and because the defendant circumvented the criminal trial process and appeal process, you can't raise it on habeas because there's a middle ground between the two; and that applies to requests where the appeal process was not circumvented but the defendant did raise them but they have not yet been decided. And if you read Slayton against Paragon and Hawks against Cox, there is still a function for the habeas corpus courts to consider those claims that were not yet decided against the petitioner, and this is certainly one of them.

And let me just also add, Your Honor, that we also argue in the petition and in our brief that the ends of justice exception that's in the procedural bar

rules itself, Rule 5:25, which the Supreme Court applied to avoid getting into the merits of this case, has an ends of justice exception in it; and we argue that Your Honor is free to apply the ends of justice exception and reach the very substantial issue that Your Honor was concerned with at the trial that has never been reached before in the interest of justice.

The Commonwealth argues that Rule 5:25 applies only on appeal and there is no ends of justice exception on habeas corpus but doesn't cite anything to support that. And if the legislature thought there should be an opportunity for a court to say in order to meet the ends of justice even if something is procedurally barred we can still reach it, then certainly this one which was raised before which Your Honor was concerned about below which was argued on appeal which was not overlooked and has never been decided on its merits is one that ought to be considered on habeas and in the interest of justice.

So it seems to me there are two grounds on which Your Honor could review this one, and I ask that Your Honor not dismiss it on those grounds. There are several others like it, and I didn't want to take Your Honor's time to go through all of them, but I do ask Your Honor to consider carefully the briefs which list

all of the claims and puts them into the categories. I do think where it comes to claims that were raised below and were not decided, that they should not be dismissed on habeas. They should be considered. And Your Honor's decision should consider not only the question of O'Dell's competency to represent himself, which is an overarching question without whatever the DNA testing shows, but these others as well.

Thank you.

MR. MURPHY: Your Honor, I might just point out that the Christianson issue at 679 of the Virginia Reports in O'Dell the Supreme Court found that that issue was barred by Rule 5:25, and my position is that Hawks versus Cox says you're bound by what the Supreme Court said on the issue and you cannot review it, and I think that's basically the procedure on the lot of these procedural bars -- those issues that were decided by the Supreme Court, that's the end of it. The Supreme Court has decided either that they are procedurally barred or they're not meritorious. Either one of those decisions ends the discussion of that issue for state purposes.

MR. ROSENFELD: Your Honor, if I just may say that as I heard Mr. Murphy make that argument it occurred to me that they're arguing that Your Honor

ought to apply Rule 5:25 to habeas corpus in the sense of saying if the Supreme Court held something barred by Rule 5:25, that ends it for habeas and it applies as well and that there's no middle ground between Hawks and Slayton as I've suggested that there is; but then when it comes to the ends of justice exception that's in Rule 5:25, it doesn't carry over into habeas and only applies to direct appeal.

I think that the ends of justice exception is something that continues throughout the life of the case and in the interest of justice this very serious claim with regard to due process ought to be considered on it's merits and ask Your Honor in this proceeding to consider it on its merits; and if Your Honor ultimately concludes that due process wasn't violated, at least there would be a hearing on the issue for the first time.

THE COURT: Well, I think on the remaining issues you are entitled to a little more than shooting from the hip; and while I have reviewed this in light of the arguments today, I'd like to submit a letter on it. Now with respect to the two points we have, that is, with respect to the DNA and the competency, those I'm definitely not going to rule on until the reports are back.

The rest of it I'm either going to say yea or nay as to whether it survives, notwithstanding anything, in part or it may be in toto; and in initial review I have some preliminary opinions on it. I'm not sure I'll change my mind, but I would like to think on it before I rule.

I have already told you the matter concerning impossibility of parole is dismissed. That's just flat denied. Someone else is going to have to make that decision. I think that's been dealt with both by the Virginia Supreme Court and this court, and I'm bound by what the Supreme Court does there or has done there and the law that appears to be applicable.

If somebody wants to declare it improper or unconstitutional based on the United States Constitution, so be it. Arguments can be made both ways there as to whether a defendant faced with a death sentence should have instructions from both the prosecution and defense concerning eligibility for parole.

All I can do is speculate as to what the jury may or may not have done in this case, but it seems to me that they were not unmindful that Mr. O'Dell had apparently been involved in a homicide in prison while sentenced for something else in Virginia, and they

could have very well decided so what. He got out on parole. He's obviously subject to rehabilitation in confinement. So I don't know, and it could have been a double whammy as far as Mr. O'Dell is concerned.

But, anyway, you have the benefit of the Court's comments as to why we did what we did. I think it's evident in the record anyway from the beginning until the eleventh hour and fifty-nine minutes those instructions would go to the jury, and it was decided at the last minute not to do it.

MR. ROSENFELD: Your Honor, as I said, we got this reply brief from the Commonwealth in fact just yesterday, and I tried to address myself to some of the arguments that they have made for the first time in that brief orally today; but may we submit either, as Your Honor prefers, a short letter or a reply just addressed to that piece of paper we got yesterday? I think that may help the Court because I rushed through it in view of the hour. It won't be very long.

THE COURT: If you like. It should not take you very long to do it. Only two cases essentially involved.

MR. ROSENFELD: I think we can do it within a week if that will be satisfactory.

THE COURT: Let's see. File it by the 31st,

5:00, Thursday afternoon.

MR. MURPHY: Thank you very much.

THE COURT: So I can have it over the Labor Day weekend. I'd like to get it cranked out in a hurry so I know where we stand. But as to the two matters involved, get at least an order prepared and everybody enter that promptly.

MR. SEBOK: I will apply myself to that. I was going to mention there is also a motion for further discovery which we've filed. And it's not specific simply because, as Your Honor will recall, the last time -- well, prior to the habeas corpus writ being filed, I moved for a motion for further discovery under the rules; and the court found that that was premature in that no writ or no petition had been filed. Now that the petition has been filed, we would ask that that be granted.

THE COURT: You'd better find out if that's going to survive before we enter an order for discovery.

MR. ROSENFELD: Your Honor, some of the discovery we want does go to the question of competency. In addition to the evaluation Your Honor has ruled on, there is additional discovery that we think will develop evidence for a hearing on that issue

particularly with respect to Mr. Ray's files. You remember that Mr. Ray several times during the trial asked Your Honor to have another competency evaluation and wanted to make certain evidence -- certain information known to Your Honor in camera.

I do think that it is important to have discovery of that and make a record on what it was so that we have a complete record here. The Superintendent against Barnes case that I've cited to Your Honor says that on these questions of competency to waive right to counsel and represent yourself it is critical to make a full record. The Supreme Court said quoting, Townsend v. Sain, "The petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues." And in that case the disputed issue is was the decision to allow the defendant to represent himself appropriately made. So we would like discovery on that.

I can be specific on what it is. I'm not sure the rulings require me to be; but if Your Honor will give us an order to allow us to take additional discovery on that issue at least, and we'll reserve the right to come back on anything else after Your Honor issues its decision.

MR. SEBOK: I would also add, Your Honor, since we are already contemplating reports on the DNA and the competency, for instance, I may wish to locate and provide to whoever does the competency evaluation of Mr. O'Dell certain information, and I think that that is what this provision in the rules is for so that I can proceed at pace. Irrespective of the decision the Court comes to with regard to the other points, those will remain viable for some time.

THE COURT: They may or may not. I wouldn't consider entering that order until you were very specific and running it past the Attorney General who may or may not agree to it.

MR. SEBOK: So it would be preferable to the Court that basically we do as we did with the DNA? A specific request be made for each discovery?

THE COURT: Well, I think if you want specific discovery on those things, you need to delineate the specific things you're interested in and run it past Mr. Murphy. He may agree with the framework of the citations you've given if that is a legitimate request. He may say no, let's wait and see until the clinical evaluation is complete. I don't know what his position is going to be because I don't know what you're looking for.

MR. ROSENFELD: I've mentioned one, Your Honor, which is discovery of Mr. Ray's files and an opportunity to --

THE COURT: You see the problem with Mr. Ray's files raises an interesting point. He's not the attorney for him. He has never been the attorney for the defendant. I realize you take issue with that fact.

MR. ROSENFELD: Your Honor, he was for a while.

THE COURT: But counsel of record is in fact Mr. O'Dell. The man was there as an expert, as a practicing lawyer to give him advice on various points. It's true he was asked on occasion to argue certain things, et cetera, et cetera; but all the decision making process was made by Mr. O'Dell.

MR. ROSENFELD: Your Honor, that was during the trial; but the order is very clear that Mr. Ray was counsel of record for a good long time prior to trial. Then there was a period when O'Dell asked to be pro se. Then he switched back, and Mr. Ray was counsel of record. And then at the trial Your Honor has correctly stated what the relationship was. But there certainly was a period, and the period I'm talking about during which Mr. Ray was asking Your Honor to have Mr. O'Dell retested for competency was just when Mr. O'Dell was

again claiming the right to represent himself after Mr. Ray had served as counsel of record for a while. So what Mr. Ray --

THE COURT: The record should be abundantly clear the reason he was having the tete-a-tete with Mr. O'Dell was over Mr. O'Dell's foolishness to represent himself again and, therefore, if he's not stupid, then he obviously is nuts and should be evaluated again. That basically is what it boiled down to each time. Same thing over and over, and Mr. Ray simply protecting his posterior from the anticipated attack in a writ of habeas corpus. He knew it was coming. Damned if he did, damned if he didn't.

MR. ROSENFELD: Your Honor, I'm not setting my sights on Mr. Ray or saying that he did anything wrong, but I am saying I do believe that based on this record both his files and his testimony are going to be relevant on the question of whether Mr. O'Dell was competent to represent himself and that that's discovery we ought to be entitled to under Superintendent against Barnes which says on the issues in habeas a full record --

THE COURT: May very well be. I'll let you take it up with Mr. Murphy specifically what you're looking for. Mr. Murphy may decide. If he can't decide, I'll

decide. But the issues we're talking about at the moment concern DNA and competency. The rest of it is off until I decide whether to follow frankly my inclination and deny everything except those two. That's where I'm starting off from; but in fairness to you, I want to let you know that.

MR. SEBOK: I understand that, and we will get our specific list to Mr. Murphy or Mr. Wells, and if we agree, we'll --

THE COURT: I don't have any problem with it. At some point you're entitled to discovery. The question in point is how much and what. I'm sure Mr. Murphy probably recognizes that as well. The problem we had before was I didn't have a written menu and that was a fishing expedition to find the facts necessary to file the writ.

MR. SEBOK: Your Honor, it may seem like that was the case, but I assure you it wasn't. We had the same thing in mind as we do now.

THE COURT: I understand you have a problem, and it's a practical one, and the rules may be different from jurisdiction to jurisdiction; but that appears to be the rule in Virginia. You don't do it until after you file it, and then you come back and amend it which you did.

(The hearing ended at 4:45 p.m.)

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CLERK'S CERTIFICATE

I, J. Curtis Fruit, Clerk of the Circuit Court of the City of Virginia Beach, State of Virginia, do hereby certify that the foregoing is a true and correct copy of the proceedings had in the case of Joseph Roger O'Dell, III, Petitioner, v. Charles E. Thompson, Warden, Mecklenburg Correctional Center, Boydton, Virginia, et al, Respondents, and the same were lodged and filed with me as Clerk of said Court on this _____ day of _____, 1989.

_____
Clerk of the Circuit Court of the
City of Virginia Beach, Virginia

By_____
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOSEPH ROGER ODELL, III,

Petitioner,

v. CASE NO. CL89-1475

CHARLES E. THOMPSON, WARDEN,
MECKLENBURG CORRECTIONAL CENTER, ET AL.,

Respondents.

ORDER

This Court, having considered the second amended petition for a writ of habeas corpus, the fourth motion to dismiss of the respondents, the memorandum in opposition to that motion to dismiss, and all of the previous pleadings filed herein, and this Court having heard argument on these matters on August 14, 1990, for the reasons set forth in the order of this Court entered on January 31, 1990 and for those additional reasons set forth at the conclusion of the argument on August 14, 1990, dismisses all of the claims in the second amended petition for a writ of habeas corpus with the exception of the following claims which were retained by that order:

> Claims II(B)2 and II(B)4 and IIE, set forth in paragraphs 183-189, 196-198 and 203-209, alleging that petitioner's waiver of counsel was invalid;
>
> Claims IVB and IX, set forth in paragraphs 235-238 and 294, alleging that on the basis of cumulative error the serological evidence produced at trial was unreliable.

The Court, on the basis of the aforementioned pleadings and proceedings, dismisses the following allegations raised for the first time in the second amended petition for the following reasons:

> Claim IIC which alleges that trial counsel was ineffective for failing to ensure a proper evaluation of the petitioner is dismissed because Dr. Kreider was provided with all the materials required by statute and relevant to the inquiry;
>
> Claim XXI is dismissed because no material evidence of perjury beyond that known to petitioner at the time of trial has been produced;
>
> Claim XXII is procedurally barred under Slayton v. Parrigan, 215 Va. 27 (1974), since it could have been raised at trial and on appeal and was not;
>
> Claim XXIII is dismissed because Doctor Kreider was qualified to make the sanity and competency evaluations and had available to him all materials relevant to his evaluations.

The claims related thereto having been dismissed, the Court denies the motions for discovery and for a live juror poll.

The Court reserves for a subsequent ruling the motion to enjoin counsel for the respondents from communicating with petitioner's trial counsel until the time set forth for delivery to opposing parties of all documents and the names of witnesses to be used at the evidentiary hearing.

For the reasons set forth in his memoranda in opposition to Respondents' first and fourth motions to dismiss, Petitioner objects to those rulings dismissing any part of his petition for a writ of habeas corpus, and to those rulings denying his various motions relating to this petition.

The Clerk shall send a copy of this order to counsel for the petitioner and counsel for the respondents.

Enter this 1ST day of OCT, 1990

Judge

Seen and objected to in part:

Counsel for Respondents

Seen and objected to in part:

Counsel for Petitioner

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOSEPH ROGER O'DELL, III, Petitioner,
v
CHARLES E. THOMPSON, MECKLENBURG CORRECTIONAL CENTER, et al, Respondents.

DOCKET NO. CL89-1475

Stenographic transcript of proceedings had upon the trial of the above-entitled cause in said court on August 14, 1990, before the Honorable Austin E. Owen, judge of said court.

-----oOo-----

APPEARANCES: Paul, Weiss, Rifkind, Wharton & Garrison (Ms. Sara L. Mandelbaum) and Mr. Andrew R. Sebok, attorneys for the petitioner.

Mr. Eugene Murphy, Assistant Attorney General, and Mr.Linwood T. Wells, Jr., Assistant Attorney General, attorneys for the respondent.

the characterization that -- um -- Judge Spain just scheduled an evidentiary hearing because he wanted to see what we have.

Well, even if that's true, we haven't shown what we have yet. September 17th is the day for that; so at the very least, this motion is entirely premature. They haven't even seen what we have. I'm sure if they'd like, after they do see, they're entitled to file their fifth motion to dismiss which they will no doubt do.

That's all for now.

MR. SEBOK: Your Honor, may I have one? We haven't had a chance to converse on everything.

I just wanted to point out to the Court that in our second amended petition at Page 19, there is a synopsis of the introduction of Doctor Krieder's evaluation to the Court, and they -- the Commonwealth said it was a full and fair hearing. In my opinion, it was simply received; and when the Court's considering that matter, you might want to look at that.

THE COURT: As counsel noted at the beginning of the proceedings, there are a number of matters before the Court today; but the principal one and all argument has addressed so far deals with the motion of the respondent to dismiss each and every contention of the petitioner as the basis for granting a writ of habeas corpus.

Judge Spain had ruled on numerous of these matters, and there is a disagreement between counsel as to whether some number of those that he ruled should be dismissed have in some way been revived by contentions that there is new indications with respect to those.

The Court has, for that reason, carefully reviewed each of those, and is of the opinion that Judge Spain's ruling dismissing those should continue, that there has been nothing that in essence changes the nature of the claim and ruling here before me should continue in effect.

For the moment, I'm going to skip over those claims that Judge Spain ruled should be retained and will return with those in a moment, but first I will address the new issues that have been raised in the most recent amended petition.

The first of those which is Numbered 21 relates generally to the use of the testimony of Watson which it is intended was perjured testimony. I think the important aspects of this matter are to note that whether the witness was telling the truth or not is one of the principal positions of the two individuals in the course of the trial before the jury.

Obviously, the Commonwealth contended that Watson was relating accurately what was in the nature of a statement against interest or a confession from

Mr. O'Dell, and the contention of the defense, Mr. O'Dell, was that Watson's testimony was made out of hope.

There was cross-examination. There was every effort to impeach the testimony of the witness, and the jury had that opportunity to review the witness, consider all of the evidence, and to evaluate it under the circumstances there in existence. The contention made now that the affidavit filed by Mr. Holmes raises some new matter is really not so.

The only thing that it possibly brings into view that was not heretofore considered by the jury is a contention that he's not now sure as to what was the cause of death; whereas at trial, he seemed to indicate that Mr. O'Dell had told him it was strangulation.

That small difference which could be accounted for by the passage of time is not a sufficient basis to cause this Court to believe that perjured testimony has been presented and undertake to substitute its view of credibility for that of the jury that saw the witness, heard all of the testimony under the circumstances therein existing.

The Court's of the opinion that the respondents' motion to dismiss that claim should be granted and will do so.

Under Number 22, the petitioner raises the

question of the chain of custody with regard to the items examined serologically. The time and place to raise matters of tne chain of custody is during the course of the trial itself; and if there is a claim of error in the ruling of the trial judge, to raise it on appeal.

The Court's of the opinion that that claim is procedurally barred. There's no reason to feel that it has any application for this petition for writ of habeas corpus. The Court will sustain the motion to dismiss that ground.

Item Number 23 questions the propriety of the examination conducted by Doctor Krieder as to his sanity at the time of the crime and competency to stand trial. The question again that is raised by this matter deals with that which was raised in one of the retained claims; and that is, the qualifications of Doctor Krieder and the information that was made available to him for the purpose of his examination; however, one of the principal claims on the earlier matter was that the doctor was inexperienced in making that type of examination.

There is no basis for the contention that when he's a practicing psychiatrist, is not familiar with the determination of the two issues here; that is, competency to stand trial and sanity at the time of the offense. The respondent has pointed out the matters that were

available to Doctor Krieder provided him by counsel for Mr. O'Dell who was at the time serving as counsel rather than as standby. The principal claim of the matters of significance as I said, not to have been provided, the Commonwealth did not provide nor did counsel for the defendant a statement of circumstances and facts relating to the crime.

In that regard, I think it's important to keep in mind that this was a circumstantial evidence case. The only evidence possessed by the Commonwealth with regard to the manner of the crime that was not disclosed in the autopsy was the testimony offered at trial from Mr. Watson. Whether that information was available to the Commonwealth at that time, it is not known; but in any event, it related to the manner and what caused the death, and better evidence of that was contained within the autopsy report itself.

Consequently, there is nothing that the Commonwealth could have offered to explain the method, manner and circumstances of the crime that was as good as and certainly not better than the autopsy report.

The Court's of the opinion that Doctor Krieder had that which he needed to make the examination, that he is qualified to do so, and that there is no reason to feel that there is some basis there that would indicate

that Mr. O'Dell is being unlawfully detained. The Court will grant the motion of the respondent to dismiss that shortage.

In doing so, the Court is aware of the sub-issue raised there that Mr. O'Dell's counsel at the time was ineffective because he failed to see that Doctor Krieder was provided the necessary materials. The answer to that is twofold.

Number one, the Court has found and believes that all records and materials necessary for proper examination were provided; and secondly, in any event, that that which it is claimed was not provided, should have been provided by the Commonwealth rather than by defense attorney; and again, these are matters that could and should have been raised at the time of the presentation of that or certainly during the course of the trial.

The Court then will return with those matters that were retained in the orders previously entered by Judge Spain. They dealt with the scientific evidence, the serological evidence, and the competency of Mr. O'Dell to represent himself. They were sub-issues, but they are the basic areas which were reserved. For the reasons that the respondent has argued, were this matter coming before me initially with no other ruling, my inclination would be to rule that they were procedurally barred,

that regardless of what others in the area might feel as to the adequacy, competency, and so forth of Miss Emrich to perform the serological evidence. That was the evidence that was produced. That was the evidence on which there was an opportunity to cross-examine. That was the evidence on which there was an opportunity to produce anything to the contrary.

My recollections from the brief -- though I have not read the transcript, my recollection from the brief is that there was evidence offered to point to a belief that others -- that this type of testing was not accepted at that time in the scientific community and to raise questions as to the manner in which the evidence was produced by Miss Emrich; but for the same reason as to the O'Dell competency matter, the Court is of the opinion that for whatever reasons, Judge Spain determined that these matters should be inquired into further; and the Court's of the opinion the only appropriate way in which that further inquiry can be conducted is through a hearing.

I find it ~~difficult to conceive~~ under what circumstances further development of these is going to lead to a basis for the granting of the writ, but nevertheless under those -- the background of the rulings by Judge Spain, I think it appropriate to permit the matter to continue to the already scheduled hearing to

produce those matters and at least have a full record if any appellate court to consider with respect to what may be adduced at that time.

For those reasons, the Court in essence is going to sustain all of Judge Spain's rulings as set forth in his prior orders both as to those dismissed and as to the areas that were retained.

The Court has before it here today also additional matters; and that is, a request for further discovery particularly as to the Watson testimony. The Court is of the opinion for reasons already stated that further inquiry into that area would not be productive or likely to be productive at all with matters relative to this petition for writ of habeas corpus and will deny the request for any further discovery in that regard.

There is also a request for a live jury poll. This is made in light of some telephone poll results that have been reported. There is several matters of significance with regard to that request. First, the whole undertaking is an undertaking to find out what persons who might have been jurors might have decided if they had been given instructions which the Supreme Court of Virginia has held would be erroneously given. Stated in that light, it's a rather absurd matter to bring before the Court. It would be just like saying

if I make up some further instructions that would tell the jury that the defendant is innocent regardless, what would the jury do?

To tell them that they might have reached a different result had they been improperly instructed would go nowhere; but beyond that, the person conducting this telephone poll concedes that he does not have evidence from that telephone poll that indicates that the result had they been given those instructions would be any different from the result that was obtained. Merely an indication that they would have considered the overall evidence in a different manner, but no indication that they would have produced a different result.

The Court is of the opinion for the reasons stated that there is no basis for any further pursuit of that area, and that the request for discovery for request in that area should be denied, and the Court does so rule.

The Court is of the belief, and please correct me if I'm wrong, that the necessary dates for production to the other side and the date of the hearing and so forth are already set, and that there is no reason at this time to consider any change for those matters. Consequently, unless I'm advised otherwise, those dates already set will continue in effect.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOSEPH ROGER O'DELL, III,

Petitioner,

v. CASE NO. CL89-1475

CHARLES E. THOMPSON, WARDEN, MECKLENBURG CORRECTIONAL CENTER, et al.,

Respondents.

ORDER

This proceeding came on to be heard on October 23, 1990, upon the Second Amended Petition For a Writ of Habeas Corpus and the fourth Motion to Dismiss, the Petitioner appearing in person and by his attorneys, Robert S. Smith, John P. Coffey, John R. Quinn, and Andrew R. Sebok, and the Respondent appearing by Eugene Murphy and Linwood T. Wells, Jr., Assistant Attorneys General.

This Court having heretofore dismissed all allegations in Petitioner's Second Amended Petition except Claims II(B)2, II(B)4, and II(E), set forth in paragraphs 183-189, 196-198, and 203-209, alleging that Petitioner's waiver of counsel was invalid, and Claims IV(B) and IX, set forth in paragraphs 235-238 and 294, alleging that on the basis of cumulative error the serological evidence produced at trial was unreliable, after hearing the evidence of the parties and the argument of counsel, doth find for the reasons given at the conclusion of the hearing from the bench that Claims II(B)2, II(B)4, II(E), IV(B) and IX should be dismissed and the Petitioner is not entitled to the

relief sought.

For the foregoing reasons, the Court is of the opinion that the Second Amended Petiton For A Writ Of Habeas Corpus be, and is hereby, denied and dismissed, it is, therefore,

ADJUDGED AND ORDERED that the Second/AMENDED Petition For A Writ Of Habeas Corpus be, and is hereby, denied and dismissed, to which action of the Court Petitioner notes his exceptions.

The Clerk is directed to forward a certified copy of this order to the Petitioner, the Petitioner's counsel, Robert S. Smith, John P. Coffey, John R. Quinn, and Andrew R. Sebok, the Respondent, Linwood T . Wells, Jr., and Eugene Murphy, Assistants Attorney General.

Entered this 26 day of November, 1990.

Judge

We object to this:

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By:

Andrew R. Sebok
Counsel for Petitioner

Certified to be a TRUE COPY
of record in my custody.
J. Curtis Fruit, Clerk
Circuit Court, Virginia Beach, Va.
BY:
Deputy Clerk

See next page for additional endorsements

We ask for this:

Eugene Murphy
Assistant Attorney General

Linwood T. Wells, Jr.
Assistant Attorney General

#74

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

JOSEPH ROGER O'DELL, Petitioner,

v

CHARLES E. THOMPSON, MECKLENBURG CORRECTIONAL CENTER, Boydton, Virginia; EDWARD W. MURRAY, Director, Virginia Department of Corrections; MARY SUE TERRY, Attorney General of the Commonwealth of Virginia; and the COMMONWEALTH OF VIRGINIA, Respondents.

RECORD
CL89-1475

Stenographic transcript of the testimony introduced and proceedings had upon the trial of the above-entitled cause in said court on October 23, 1990, before the Honorable Austin E. Owen, judge of said court.

-----oOo-----

APPEARANCES: Paul, Weiss, Rifkind, Wharton & Garrison (Mr. John P. Coffey, Mr. Robert S. Smith, and Mr. John R. Quinn) and Mr. Andrew R. Sebok, attorneys for the petitioner.

Office of the Attorney General (Mr. Eugene Murphy and Mr. Linwood T. Wells, Jr.), attorneys for the respondents.

THE COURT: I believe I interrupted you-all. Do you have anything further you want to --

MR. SMITH: I don't think you interrupted, Judge.

THE COURT: All right, sir. I have had the law clerk bring over the volumes of United States Reports that have been referred to previously. I am going to take a few moments and see if I can't digest those and hopefully render a decision before we adjourn tonight.

We will recess briefly.

(The hearing recessed at 5:12 p.m. At 6:18 p.m., the hearing continued as follows:)

THE COURT: I appreciate very much the patience of all concerned while I have reviewed my notes and undertaken to read four of the more recent cases decided by the Supreme Court of the United States and cited by counsel for the petitioner. Now I will attempt to organize my thoughts with respect to the issues that are before us.

At the conclusion of the petitioner's evidence, the respondent moved the court to strike the evidence of the petitioner; and the court for reasons then stated, deferred its ruling. The respondent then proceeded to offer its evidence, and

the court at this time will rule simultaneously on that motion to strike and on the merits of the petition as well.

Two basic issues have been raised for argument and introduction of evidence before the court here today. The first issue is whether the petitioner was deprived of his Constitutional right to counsel by virtue of the contention that he did not voluntarily waive his right to counsel.

The gist of the evidence and argument with respect to this claim is to the effect that there was an inadequate and improper evaluation of the defendant by Doctor Kreider and that it, therefore, was not sufficiently shown that the defendant was competent to waive counsel.

Addressing this argument, I think first that it is appropriate to note that even if from the evidence the court were to find that Doctor Kreider's evaluation was deficient, as argued by the respondent, there is nothing in the evidence to reflect that any prejudice resulted from any such deficiency, and there is nothing in the evidence before the court to indicate that a so-called proper evaluation would have indicated that the defendant was incompetent to waive his right to counsel.

Secondly, I think it appropriate to note that the court in its review of these cases, and consistent with its recollection of other cases that we just read from the Supreme Court of the United States on the same subject, finds nothing in those decisions to reflect any Constitutional requirement that there be any type of psychiatric or psychological evaluation as a requisite to the determination by the trial court that the defendant has made a valid waiver of his right to counsel.

Examining those particular cases individually, and I am just picking them up in the order in which the clerk has placed them here on my desk, there is the case of Massey versus Moore, the US cite for which counsel has previously provided; and I have the Supreme Court cite, which is 75 S. Ct. 145.

The court notes there are extreme circumstances which are so far different from the current ones that it has little direct precedential value. There the petitioner's trial on a robbery charge started and ended the same day. He had been confined to the psychopathic hospital of the state prison for several months prior to the trial and for part of that time was kept in the cell block reserved for the most violent inmates.

He was removed from a straitjacket March 7, 1941, and tried March 11, 1941. He stood without benefit of counsel. The crime with which he was charged carried a mandatory life sentence because the petitioner suffered two prior felony convictions.

Petitioner declined to plead guilty. Hence, a plea of not guilty was entered. So far as we are advised, petitioner took no part in the proceedings and made no attempt to conduct any defense.

Petitioner was convicted and immediately sentenced. Shortly thereafter, he tried to commit suicide. Then he was recommitted to the psychopathic ward where he was confined for several months more.

While he was so confined, the time for appeal from his judgment of conviction expired. Since his conviction, petitioner had tried repeatedly to obtain a writ of habeas corpus both in state and federal court. He repeatedly claimed he was tried and convicted without counsel while he was insane and unable to defend himself.

Without continuing to read, the case goes on to reflect the fact that through clerical error, the record reflected throughout that he was represented by counsel; and it was only recently before this hearing that both the trial judge and the prosecutor

had executed affidavits reflecting that, in fact and in truth, there was no attorney representing the defendant at time of trial, and hence all his prior writs of habeas corpus had been denied.

The court notes in the course of its opinion, that we have not allowed convictions to stand if the accused stood trial without benefit of counsel, and yet was so unskilled, so ignorant, or so mentally deficient as not to be able to comprehend the legal issues involved in his defense. Insofar as a standard is concerned as expressed by the Supreme Court, I think that comes as close to any as have been expressed in any of the opinions.

The court then concluded with, "We do not intimate any opinion on the merits of case, for we do not know for a fact that any were produced. We only rule that if the allegations charged are proven, petitioner has been deprived of his liberty without due process of law."

As you note, there is nothing in that opinion reflecting any requirement that, for the purpose of determining competency, there be any examination by a psychiatrist or psychologist.

In the case of Drope versus Missouri, reported in 95 S. Ct. 896 -- in that case, the court noted

that in an earlier decision, Pate versus Robinson, the import of that decision was that evidence of the defendant's irrational behavior and demeanor at trial and a prior medical opinion on competency to stand trial are all relevant in determining whether further inquiry is required; but that even any of these, notwithstanding alone, may in some circumstances be sufficient.

The court goes on to state, "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed. The question is often a difficult one in which a wide range of manifestations and some nuances are implicated. That they are difficult to evaluate is suggested by the bearing of the trained psychiatrists in entering upon the same facts."

Continuing in another point in the opinion, the court said, "Even when the defendant is competent at the commencement of his trial, a trial court must always be alert for circumstances suggesting a change that would render the accused unable to meet the standard of competency to stand trial"; and the court goes on further in that same and similar vein. It's noteworthy that the issue in that case was not

competency to waive counsel, but rather competency to stand trial.

The court in that case reversed for failure to have a reevaluation by virtue of the evidence that was disclosed in that particular case. Again, no indication that any psychiatric or psychological examination should have been required except for the fact of irrational behavior during the course of the trial in the courtroom.

The next of the cited decisions was Westbrook versus Arizona, which is cited as 384 US 150 and is also found in 86 S. Ct. at Page 1320. There the court issued a hearing opinion. There were motions for leave to proceed in forma pauperis and a petition for writ of certiorari.

The court says although the petitioner, received a hearing on the issue of his competency to stand trial, there appears to have been no hearing or inquiry into the issue of his competency to waive his Constitutional right to the assistance of counsel and to proceed as he did to conduct his own defense.

"The Constitutional right of an accused to be represented by counsel invokes of itself the protection of a trial court in which the accused, whose life or liberty is at stake, is without

counsel; and this protecting duty imposes serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

"From our examination of the record, we conclude that the question of whether this protecting duty was fulfilled should be reexamined in light of our recent decision in Pate versus Robinson," and they therefore remanded the matter to the Supreme Court of Arizona.

It's interesting to note again that the Supreme Court did not place the burden upon psychiatric or psychological evaluations, but placed the burden upon the trial judge to determine whether there was an intelligent and competent waiver of the right to counsel.

Finally, in the decision of Farretta v. California, 95 S. Ct. 2555, the Supreme Court goes at great length into the history of the English common law and the early common law in this country, the Constitutional considerations, and the drafting of the amendments to the Constitution, and concludes that there was a common law, and there was in the mind of the drafters of the Constitution not only the right to assistance of counsel, but the overriding

right to represent oneself if competent to do so; and the court went on to say, "It's undeniable that in most criminal prosecutions, defendants could better defend with counsel's guidance than by their own unskilled efforts; but where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized if at all only imperfectly. To force a lawyer on a defendant can only mean that the law conspires against him.

"Moreover, it is not inconceivable, but in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal.

The defendant and not his lawyer or the state will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether or not in his particular case counsel is to his advantage; and although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law."

The court went on further to say that it was necessary that the accused must, quote, knowingly and intelligently, unquote, forego his right to counsel, that in order to determine whether he was competently, intelligently waiving those rights, he should be made aware of the dangers and disadvantages of self representation so that the record will establish that he knows what he's doing and his choice is made with his highest hope; and then they concluded with the remarks that, "We need make no assessment of how well or poorly Farretta had mastered the intricacies of the hearsay rule, the California Code Divisions, the challenges of potential jurors on voir dire, or his technical legal knowledge as such was not relevant to an assessment of his knowing exercise of the right to defend himself."

That was a case in which the California courts had compelled the defendant to accept counsel and to proceed to trial with counsel; and the holding was they erred, that he should have been permitted as he requested to represent himself.

Once again, it's clear that the inquiry is not what the psychiatrist or psychologist might have found, but rather what the court finds as to whether

there is a knowing and intelligent waiver of the Constitutional right to counsel.

With that background and with those standards as established by the Supreme Court of the United States, I think we can continue to examine the issues before the court.

On this issue of whether or not there was an intelligent and knowing waiver of the right, the petitioner called Doctor Showalter, who undertook to establish a standard, which he admitted was one that he had gathered from several sources, including ABA standards; and he indicates or believes that these standards should have been followed by Doctor Kreider; but his testimony would indicate that even he had not established these standards at that time; and certainly they were not standards generally recognized and in existence at the time of Doctor Kreider's evaluation, nor is there any indication today that the standards indicated by Doctor Showalter are appropriate or accepted anywhere other than in Doctor Showalter's immediate environs; but even if one were to accept Doctor Showalter's standards as those that should have been in effect at the time of Doctor Kreider's evaluation, as testified to by Doctor Showalter, they would require first some

inquiry into the defendant's perception of the perceived advantages of waiving counsel and of representing himself, inquiry as to how he could do a better job than counsel could do; and in this respect, the report of Doctor Kreider is admittedly missing a page representing that which would have been approximately one-third of his overall report; and also the record reflects from his testimony today, presumably from his prior depositions, that Doctor Kreider has virtually no recollection independent of that which is set forth in his written report, which is Exhibit Number 6 to the petitioner in this case.

Nevertheless, even that portion of his report, which is here in evidence as Exhibit 6, seems to affirmatively show that Doctor Showalter did do what this standard would have required him to do. It seems to show that there was inquiry in discussion of this aspect because it reflects affirmatively that the defendant acknowledged to the doctor that it was unwise to represent himself and acknowledged that he was familiar with a quote which he attributed to F. Lee Bailey to the effect that a man who defends himself has a fool for a client.

Obviously for these aspects to come into

discussion and appear in the report of Doctor Showalter, there had to have been inquiry into discussion of the question of whether he was aware of the dangers, whether or not he perceived the problems in representing himself, and why he would want to undertake to represent himself.

Considering the responses that he received, Doctor Kreider nevertheless concluded from his overall interview with the defendant, lasting for a period of approximately an hour, that in his words there was no contraindication to self representation on grounds of either mental disorder or low intelligence; and he indicated that if it is otherwise legally permissible, that the defendant was competent to represent himself.

Secondly, Doctor Showalter, who would require as a standard some determination that defendant was aware of the adversary proceedings, the role of the prosecutors, the role of the judge, the defense attorney, the jury, and so on and so forth in that general vein -- Doctor Kreider's report addresses this only in a conclusionary manner, in which he found that the defendant was competent to understand the nature of proceedings against him, to assist as counsel, and to represent himself; but more

importantly to this aspect of the matter, the record reflects that Judge Spain made his own rather substantial inquiry into all of these factors; and after his examination of the defendant in this regard, reached the conclusion that the defendant's desire to represent himself was an intelligent and knowing decision and represented an intelligent and knowing waiver of his right to counsel.

That defendant was familiar with these various roles of parties to a trial would also become manifest during his rather extensive criminal record and assistance prior to the time of this trial; that is, his considerable experience in courtrooms and in the courtroom setting and also being numerous pretrial appearances in the court in this very same proceeding.

In this same standard -- or in the course of discussion of this same standard, Doctor Showalter alluded to the fact that the undertaking to represent oneself would generally be likely to reflect an overwhelming view of oneself, a grandiosity, and perhaps paranoia.

Upon questioning by the court, Doctor Showalter in effect conceded that in his view of this aspect of the matter, virtually anyone charged with

capital murder would be incompetent if he decided to represent himself, and that it would only be in the most exceptional circumstances that the person could competently waive his right to counsel.

This view, as the court sees it, is honestly the interpretation of the United States Constitution as made by the Supreme Court of the United States and as already alluded to in quotes from extracts from several of the opinions that we have just mentioned a few moments ago.

Doctor Showalter also indicated that the defendant's incompetence was evidenced conclusively by his failure to offer any mitigating evidence, but there is nothing in his testimony or anywhere else in this record to indicate what mitigating evidence there was that the defendant could and should have offered for the jury in the course of the trial.

Doctor Showalter's next standard would have required the evaluator to gather all possible data from records, from friends, from family, from employers, the entire medical and psychological examinations -- all of these as essential to a proper determination.

With respect to this standard, Doctor Kreider made the defendant's own statements; and as I

understood Doctor Showalter's testimony, the defendant's statements to the evaluator would constitute somewhat the centerpiece of evaluation; and all of this other information gathered would be used to evaluate the defendant's sanity.

Doctor Kreider had the benefit of a prior written psychiatric report. He was, as shown in his written report, Exhibit 6, familiar with many of circumstances of the offenses alleged. The record also reflects from Plaintiff's Exhibit Number 8 that he had been provided with various documents other than the psychiatric report by Mr. Ray. The record also reflects that he was only made aware of one relative who might have helpful information, and was unable to contact that relative, a sister of the defendant; but in Mr. Ray's, letter he was made aware of the fact that that sister believed that the defendant was mentally ill.

These factors considered, Doctor Showalter was of the opinion that Doctor Kreider's evaluation was sufficient; and he seems to have reached this conclusion in substantial part by reading some one hundred pages taken from various portions of the 8,000-page transcript, and thus which might be said to be somewhat disjointed portions, to gather an

opinion that the circumstances indicated that during the trial, defendant indicated that he was incompetent to represent himself.

It's rather difficult to determine whether the psychiatrist is the appropriate person to evaluate trial strategy and things of that sort; but even if one were to assume so, it does not seem that consideration of portions of an 8,000-page transcript -- such a small portion, could possibly provide anyone with a sufficient basis to make such a determination.

Doctor Keenan, whose only forensic training was under the supervision of Doctor Showalter's group in Charlottesville, and who by his admission made his first and only evaluation on the issue of competency to waive counsel during this past year, some four years or more later than Doctor Kreider, was called upon to do so and also opined that the evaluation was inadequate; and he based his opinion solely on what he said was a failure to more fully develop the questions that Doctor Showalter would have had in his Standard Number 1; and that is: Why did the defendant want to represent himself, and why did he think he could do a better job than counsel, and so forth?

The court is of the opinion that the evidence on this issue does not justify the granting of a writ. Three reasons summarize the court's basis.

First, even if one were to say that there was an inadequate evaluation, no prejudice has been shown as a result thereof.

Two, the court is not aware of any Supreme Court of the United States holding or Supreme Court of Virginia holding that there is a Constitutional requirement for psychiatric or psychological evaluation to assist a judge in making the essential determination as to whether the defendant is competent to waive his Constitutional right to counsel.

It would seem here that Judge Spain went beyond the requirements; and even if flawed, he obtained an additional tool to aid him in making his evaluation; and the record reflects his careful consideration in all aspects; and there has been nothing to suggest that his overall evaluation of the competency of the defendant to waive his right to counsel was flawed.

Thirdly, the basis for the court's denial of the writ on this ground was that Doctor Kreider's evaluation was clearly the evaluation of a competent

psychiatrist, that his approach was not inconsistent with any standard that has been shown to have been in existence at that time to guide people making similar evaluations, nor is it shown in any respect that the conclusion that he reached was an erroneous conclusion; and finally, as already noted and perhaps most importantly, his conclusion was only one of the many factors considered by Judge Spain in making his determination, which was his duty, that the defendant was competent and did knowingly and intelligently waive his right to counsel and elect to represent himself.

The second basis upon which evidence has been heard today was the petitioner's claim that the reliability of the serological evidence produced at the time of the trial has been brought into considerable question. The court has carefully considered all of the evidence adduced with respect to that aspect and is of the opinion that the petition for writ of habeas corpus on this ground should likewise be denied on two bases.

First, the court is of the opinion and finds that the Supreme Court of Virginia has already ruled that that serological evidence produced at trial was competent and was properly admitted into evidence and

considered by the jury. It is not the function of a writ of habeas corpus to undertake to serve as an appellate court over the decision reached by the Supreme Court.

Secondly, that aspect of the matter aside, the sole method used to attack the reliability of the serological evidence adduced at trial relates to DNA testing, which the evidence indicates was in existence at the time of trial but was not in general usage at the time of trial, that the methods used by Doctor Emerich were those generally in common usage by experts at the time of trial, that the test results reached by Doctor Emerich from the standard test in use at that time were properly arrived at in accordance with the results reflected by those tests; and moreover and perhaps of equal importance, the conclusion that she reached as a result of those tests was not that there was a match between the shirt and between the victim's blood or between the jacket and the victim's blood, but rather that on the basis of her test results, it could not be excluded that there was in fact a match. In other words, there was not a direct opinion that incriminated, but rather a failure to be able to exclude the result that was sought to be offered by the prosecution in

that case.

The court is of the opinion that the serological evidence produced at trial was not flawed, that it was in accordance with recognized standards in existence at the time; and while it may be that current testing methods would have produced a different result, that that does not justify the issuance of a writ of habeas corpus.

For the reasons indicated, upon presentation of an appropriate transcript opinion and order, the court will enter the same and will request that the attorney for the respondent undertake to prepare such and afford the petitioner's counsel an opportunity to note their objections.

I would hope and request that counsel could do so in the reasonable near future, particularly in view of the fact that I'm going to be retiring at the end of this year. I would certainly like to not leave this for someone to pick up upon my retirement.

MR. MURPHY: I'll do that, Your Honor.

THE COURT: I appreciate the considerable effort all counsel have put into this matter; and I note insofar as those gentlemen who are participating here today from the bars of different states, the considerable work that you have done in this matter

can never be fully appreciated by those who are not themselves lawyers or judges; and that you have done so without compensation is certainly something for which you deserve a great deal of credit.

You have not only done the job, but you have done it extremely well and with a great deal of dedication. On behalf of all those connected with the judicial system, I want to express our appreciation.

Obviously, I don't mean to exclude Mr. Sebok from this complimentary remark. The only distinction is he has received some moderate form of compensation, but otherwise he has also done an extremely good job. I thank you all for your cooperation and help.

Court is adjourned.

(The proceedings were concluded at 6:53 p.m.)

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 1st *day of* April, 1991.

Joseph Roger O'Dell, III, Appellant,

against

Charles E. Thompson, Warden, Mecklenburg Correctional Center, et al., Appellees.

From the Circuit Court of the City of Virginia Beach

On March 8, 1991 came the appellant, by counsel, and filed a motion for an order allowing him to perfect his appeal in this case, and a memorandum in support of that motion.

Thereupon came the appellees, by the Attorney General of Virginia, and filed a response in opposition to said motion.

On consideration whereof, the appellant's motion is denied.

A Copy,

Teste:

David B. Beach
Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 1st *day of* April, 1991.

Joseph Roger O'Dell, III, Appellant,

against

Charles E. Thompson, Warden, Mecklenburg Correctional Center, et al., Appellees.

From the Circuit Court of the City of Virginia Beach

Finding that the appeal was not perfected in the manner provided by law, the Court rejects the petition for appeal in the above-styled case. Rule 5:17(a)(1).

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 7th *day of* June, 1991.

Joseph Roger O'Dell, III, Appellant,

against

Charles E. Thompson, Warden, Mecklenburg Correctional Center, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 1st day of April, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

justified, or if it found any matter concerning the offense or the offender which extenuated or reduced the degree of moral culpability or blame. On the other hand, the instructions offered by Turner tended to be repetitive and argumentative and to misstate the law. We find no error, therefore, in the trial court's refusal of Turner's instructions.

DEATH PENALTY DISCRIMINATORILY BASED UPON RACE

[9] In the trial court, Turner proffered "certain statistical evidence concerning the discriminatory impact of the death sentence in Virginia." Turner told the court he was proffering the evidence in anticipation of the decision in *McCleskey v. Kemp*, then pending in the Supreme Court of the United States.

Since Turner's proffer in the trial court, the Supreme Court has decided *McCleskey v. Kemp*, rejecting a statistical study of alleged racial discrimination in death penalty cases in Georgia. — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Turner admits that, as a result, "a capital defendant cannot adduce statistical evidence of disparate impact to prove that an entire statutory scheme is invalid." He asks this Court, however, "to hold to the contrary." We decline the request.

SENTENCE REVIEW

Under Code § 17-110.1(C), this Court must determine whether "the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." We must also determine whether the sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

3. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

4. *James Dyral Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980).

5. *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980).

Turner makes no direct contention that his death sentence was imposed under the influence of passion, prejudice, or other arbitrary factor, but says that "[i]mposition of the death sentence in this case would be disproportionate to the crime, in violation of the Eighth Amendment, and would be evidence of passion or prejudice." In any event, we find no evidence of passion, prejudice, or other arbitrary factor involved in Turner's sentence and will confine our consideration, therefore, to the question of excessiveness or disproportionality.

[10] In making our proportionality review, we have accumulated "the records of all capital felony cases . . . as a guide in determining whether the sentence imposed in the case under review is excessive." Code § 17-110.1(E). Where, as here, the basis of the imposition of the death sentence is "vileness," we give particular attention to those cases in which the death penalty was based upon the same predicate.

Turner cites prior cases where the "vileness" involved was admittedly greater than the "vileness" present here. *E.g., Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1235, 75 L.Ed.2d 469 (1983) (rape-robbery-murder victim cut at least 184 times with machete and knife). But no concept of proportionality requires that each new capital murder case equal in horror the worst possible scenario yet encountered, else the death penalty may not be imposed. As we said in *Turner I*: "While the atrociousness involved in Turner's murder does not rise to the level evidenced in *Stamper*,[3] *James Dyral Briley*,[4] or *Coppola*,[5] Turner's murder is just as brutal as the murders in *Linwood Earl Briley*[6] and *Clark*[7]...." 221 Va. at 530, 273 S.E.2d at 47.

6. *Linwood Earl Briley v. Commonwealth*, 221 Va. 532, 273 S.E.2d 48 (1980), *cert. denied*, 451 U.S. 1031-32, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981).

7. *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980).

In a proportionality review, we inquire whether "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." *Stamper*, 220 Va. at 284, 257 S.E.2d at 824. Considering both "the crime and the defendant" (Code § 17-110.1(C)(2)), we can say with confidence that juries in this jurisdiction generally approve the supreme penalty for offenses comparable to the murder committed by Turner. Indeed, recently, we cited *Turner I* in demonstrating that a death sentence imposed upon a different defendant was not "excessive or disproportionate to sentences generally imposed by juries in Virginia for similar crimes." *Barnes v. Commonwealth*, 234 Va. 130, 139, 360 S.E.2d 196, 203 (1987), *cert. denied*, — U.S. —, 108 S.Ct. 763, 98 L.Ed.2d 779 (1988) ("vileness" found in murder of store owner shot three times during struggle with robber).

Finding no error in the record or any other reason to disturb Turner's death sentence, we will affirm the judgment of the trial court.

Affirmed.

Joseph Roger O'DELL

v.

COMMONWEALTH of Virginia.

Record Nos. 861219, 870157.

Supreme Court of Virginia.

Jan. 15, 1988.

Defendant was convicted of capital murder, rape, and sodomy by force by the Circuit Court, City of Virginia Beach, H. Calvin Spain, J., and he appealed. The Supreme Court, Whiting, J., held that: (1) contemporaneous-objection rule would be enforced even against pro se defendant in capital murder case; (2) defendant had no constitutional right to demand trial by judge; (3) venire person who indicated that, if testimony conflicted, he would be more likely to accept police officer's testimony did not manifest bias requiring excusal for cause; (4) electrophoretic technique used by State to analyze dried blood found on defendant's clothing was sufficiently reliable for test results to be admitted; (5) evidence of defendant's juvenile offenses and adjudicated criminal activity was admissible in penalty phase of capital murder case; (6) standby counsel appointed by trial court did not impermissibly interfere with defendant's right to defend himself; and (7) death sentence was not excessive.

Affirmed.

1. Criminal Law ⇐641.6(5), 1036(1)

Contemporaneous-objection rule would be enforced even against pro se defendant in capital murder case. Sup.Ct.Rules, Rule 5:25.

2. Criminal Law ⇐577.10(8)

Delays attributable to continuances requested by defendant were properly excluded, in determining whether 18-month interval between probable cause hearing and trial violated defendant's speedy trial rights. U.S.C.A. Const.Amend. 6; Code 1950, § 19.2-243.

3. Searches and Seizures ⇐174

Property owner with joint right of possession to area from which defendant's blood-stained clothing was seized had right to consent to police officers' search. U.S.C.A. Const.Amend. 4.

4. Criminal Law ⇐1166(11)

Any error arising from State's failure to provide reciprocal discovery of experts to indigent murder defendant was harmless beyond reasonable doubt, where defendant had already contacted experts.

5. Criminal Law ⇐627.6(1)

Defendant had no constitutional right to pretrial discovery of plea agreement between state witness and State.

6. Criminal Law ⇐700(9)

Electrophoretic test results did not have to be excluded based on State's good-faith failure to preserve, for several months in refrigerator, its dried blood samples for independent testing by defendant; no evidence was presented of any departure by State from routine storage procedures.

7. Witnesses ⇐247

Permissible scope of cross-examination of witness is matter of discretion by trial court.

8. Costs ⇐302.2(2)

Indigent murder defendant had no constitutional right to state funding of forensic experts.

9. Costs ⇐302.2(2)

Denial of indigent murder defendant's motion, filed only short time before trial, for state funding to assist him in obtaining services of forensic experts was not abuse of discretion.

10. Attorney and Client ⇐21.10

Indigent murder defendant had no constitutional right to prevent court-appointed counsel from withdrawing for conflict of interest, where other client whom attorney represented refused to waive conflict. Code of Prof.Resp. DR 5-105(B, C).

11. Attorney and Client ⇐21.5(1)

Court-appointed counsel's alleged desire to protect himself against later charge of ineffective assistance did not, standing alone, constitute conflict of interest warranting disqualification. U.S.C.A. Const. Amend. 6.

12. Criminal Law ⇐641.7(1)

Alleged inadequacy in trial court's warning on dangers of self-representation was not sufficient to defeat defendant's waiver of right to counsel, given defendant's extensive experience in criminal justice system and demonstrated skill in raising objections at trial. U.S.C.A. Const. Amend. 6.

13. Jury ⇐29(2)

Criminal defendant has no constitutional right to demand trial by judge. U.S.C.A. Const.Amend. 6; Const. Art. 1, § 8.

14. Criminal Law ⇐1128(2)

Supreme Court could not consider census figures cited in footnotes to defendant's appellate brief, which had never been offered into evidence, in ruling on defendant's claim that venire was unrepresentative of community. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇐1166.22(2), 1171.1(3)

Isolated statements made by trial judge and prosecutor to venire during voir dire, that jury would merely "recommend" sentence, did not prejudice defendant by diminishing jurors' sense of responsibility, when statements were considered in light of instructions actually given.

16. Criminal Law ⇐655(4)

Trial judge did not improperly indicate that he thought death sentence was likely simply because he asked fewer questions designed to eliminate those veniremen favoring automatic death sentence than those designed to eliminate veniremen unalterably opposed to death sentence.

17. Criminal Law ⇐726

Pro se defendant's questions during voir dire opened door to prosecutor's statement that no negative inference could be drawn from defendant's failure to testify. U.S.C.A. Const.Amend. 5.

18. Criminal Law ⇐1166.18

Trial court's failure to excuse alternate juror for cause was at most mere harmless error, where none of alternates who heard evidence participated in jury's deliberations.

19. Jury ⇐107

Venireperson who indicated that, if there was any conflict in testimony, he would tend to believe police officer more than he would believe average citizen did not manifest bias in favor of police testimony such as would have required excusal for cause.

20. Jury ⇐132

Bias cannot be presumed solely because prospective juror believes police officer's training and experience might make officer's testimony more accurate than that of ordinary witness, provided that juror does not ignore differing circumstances of observation, experience, and bias which might be disclosed by evidence.

21. Jury ⇐108

Prospective jurors who indicated that they might not be able to follow trial court's instructions because of their feelings about imposition of death penalty were properly excused for cause in capital murder case.

22. Criminal Law ⇐671

Any determination as to reliability of scientific test should generally be made at separate hearing outside presence of jury, in order to avoid possible mistrial in event trial court concludes that tests are not sufficiently reliable to be introduced into evidence.

23. Criminal Law ⇐388

Electrophoretic technique used by State to analyze dried blood found on murder defendant's clothing was sufficiently reliable to make test results admissible, for purpose of establishing that blood belonged to victim.

24. Criminal Law ⇐388

Defendant's objection to experience and competence of examiner who tested dried blood found on clothing, and to manner in which she performed test, went to weight and not admissibility of evidence.

25. Criminal Law ⇐1036.1(9)

Any error resulting from trial court's exclusion of testimony was not preserved for review, where defendant failed to make proper showing of what testimony might have been.

26. Criminal Law ⇐641(1)

Proof beyond "reasonable doubt" is not proof beyond all possible doubt, and State is not required to disprove every conceivable circumstance of innocence.

See publication Words and Phrases for other judicial constructions and definitions.

27. Homicide ⇐354

Evidence of defendant's juvenile offenses and adjudicated criminal activity was admissible in penalty phase of capital murder case.

28. Homicide ⇐354

Evidence of convictions occurring more than ten years before subject crime was admissible in penalty phase of capital murder case.

29. Homicide ⇐311

Trial court did not have to instruct jury, at sentencing phase of capital murder case, that defendant who receives life sentence is ineligible for parole.

30. Homicide ⇐354

Hearsay evidence contained in postsentence report was admissible during sentencing phase of capital murder case. Code 1950, §§ 19.2-264.5, 19.2-299.

31. Criminal Law ⇐641.10(3)

Standby counsel appointed by trial court to assist pro se defendant in defense of capital murder charge did not impermissibly interfere with defendant's right to represent himself, where defendant controlled all vital portions of defense before jury and before court, and record showed that attorney deferred to defendant in every instance of disagreement. U.S.C.A. Const.Amend. 6.

32. Criminal Law ⇐699

A trial court has broad discretion in supervision of opening statements and closing argument.

33. Criminal Law ⇐641.10(3)

Order limiting persons who could make closing argument either to pro se defendant or standby counsel did not impermissibly interfere with defendant's right to represent himself or constitute abuse of discretion.

34. Homicide ⇐253(1)

No "heightened reliability" requirement applies in capital murder case; standard of proof is beyond reasonable doubt.

35. Homicide ⇐354

Murder defendant's extensive prior criminal record, his brutal assault on victim during or subsequent to rape, and fact that murder was committed only a few months following defendant's parole warranted imposition of death sentence. Code 1950, § 17-110.1, subd. C, par. 2.

Clive A. Stafford Smith (J. Lloyd Snook, III, Charlottesville, on briefs), for appellant.

Linwood T. Wells, Jr., and Eugene Murphy, Asst. Attys. Gen. (Mary Sue Terry, Atty. Gen., on brief), for appellee.

Present: All the Justices.

WHITING, Justice.

Joseph Roger O'Dell, III[1] was indicted and tried before a jury for the capital murder of Helen C. Schartner in the commission of, or subsequent to, rape, Code § 18.2-31(e), as well as for her abduction, rape, and sodomy by force. The trial court granted O'Dell's motion to strike the evidence on the abduction charge. The jury convicted O'Dell on all the remaining counts, and fixed his punishment at 40 years each on the rape and sodomy charges. In the second phase of the bifurcated trial, the jury heard evidence of aggravating and mitigating circumstances and fixed O'Dell's sentence at death, based on his future dangerousness. The trial court imposed the death sentence after a hearing required by Code § 19.2-264.5. Overruling O'Dell's motions to set aside the verdicts, the trial court entered judgments on all three verdicts.

We have consolidated the automatic review of O'Dell's death sentence with his appeal from the conviction of capital murder, Code §§ 17-110.1(A), -110.1(F), and given this case priority on our docket, Code § 17-110.2. We also certified O'Dell's appeals of the other two convictions from the Court of Appeals for consolidation with the capital murder appeal. Code § 17-116.06.

[1] O'Dell elected to act as his own counsel, but the trial court appointed standby counsel to aid in his defense. Because O'Dell actively represented himself in substantial portions of the pretrial proceedings and at trial, his appellate counsel suggested in oral argument that we should not require compliance with our contemporaneous objection rule, Rule 5:25. We reject this suggestion. For the reasons enunciated in *Townes v. Commonwealth*, 234 Va. 307, 362 S.E.2d 650 (1987), another capital murder case in which the defendant proceeded *pro se*, we will not consider the merits of those matters to which O'Dell failed to make the proper Rule 5:25 objection at trial. Those matters are the following:

1. The Commonwealth's Attorney's attendance at hearings in which O'Dell attempted to establish his need for experts to be paid by the Commonwealth.
2. O'Dell's later failure to request a ruling on his motion for a change of venue. The motion was made before the venire was examined, the trial court deferred a ruling on the motion, and thereafter O'Dell never requested a ruling.
3. The trial court's alleged failure to "adequately channel the jury's discretion."
4. Venireman Kelly's retention.
5. Venireman Thornton's exclusion.
6. The trial court's failure to sequester the jury.
7. Alleged misstatements of the law "concerning the consequence of the jury's failure to agree on sentence" and the refusal of an instruction on that issue.
8. The admission of evidence indicating a Bible was the only article not stolen from Christianson's car.

1. O'Dell is identified as Joseph Roger O'Dell in virtually all of the documents filed in this case, but the record shows that the indictments were amended without objection to show his name as Joseph Roger O'Dell, III.

9. The exclusion of evidence that Steven Watson was on probation in Virginia when O'Dell made his admission to Watson and when Watson contacted the Commonwealth's Attorney.
10. Restriction of O'Dell's cross-examination of Dr. Sensabaugh.

Additionally, we will not consider a different ground of objection raised for the first time on appeal, Rule 5:25; *see Jones v. Commonwealth*, 230 Va. 14, 18 n. 1, 334 S.E.2d 536, 539 n. 1 (1985), on the following matters:

1. Venireman Villandre's retention. At trial, O'Dell's objection to Villandre's retention as a juror was that he was a former military judge, *not* that Villandre was unable to accord O'Dell his constitutional rights.
2. O'Dell's objection to the admission of evidence of the theft of Christianson's clothing on the ground that it was immaterial.
3. O'Dell's objection that Steven Watson's testimony was more prejudicial than probative.
4. O'Dell's objection to the inclusion of the word "shall" in Instruction 17.
5. O'Dell's constitutional objections to the admission of hearsay statements in the probation officer's report.

Furthermore, pursuant to Rule 5:27(e), we will not consider the following assignments of error which were not argued on brief: X, XIV, XV, XVIII(b), (e)(f), (g) and (h), XXIII, and XXXI.

I

FACTS

The Commonwealth prevailed before the jury. Therefore, in conformity with familiar appellate principles, we consider the facts in the light most favorable to the Commonwealth.

On Tuesday, February 5, 1985, the victim, Helen Schartner, left a night club in Virginia Beach known as the County Line Lounge about 11:30 p.m. O'Dell left the same club sometime between 11:30 p.m. and 11:45 p.m. The next day, February 6, 1985, Schartner's car was found in the parking lot of the County Line Lounge. Near 3:00 p.m. the same day, Schartner's body was discovered among the reeds in a field near a muddy area behind another club, across the highway from the County Line Lounge. Tracks from tires consistent with the tires on O'Dell's car were discovered in an area near Schartner's body.

Schartner had been killed by manual strangulation. She also had eight separate wounds on her head caused by blows from a handgun equipped with a cylinder. These head wounds produced extensive bleeding. A handgun with a cylinder was seen in O'Dell's car about 10 days prior to the murder.

Not more than two and a half hours after Schartner left the County Line Lounge, O'Dell entered a convenience store with blood on his face and hands, in his hair, and down the front of his clothes.

Vaginal and anal swabs disclosed the presence of seminal fluid in the victim's vagina and anus containing enzymes consistent with those in O'Dell's seminal fluid.

O'Dell had been living in the home of a woman friend, Connie Craig. Approximately a week before the murder, Craig ordered O'Dell from the premises. O'Dell called Craig about 7:00 a.m. on Wednesday, the morning after the murder, said that he had vomited blood all over his clothes,[2] and stated that he wanted to talk with her before he left for Florida.

When O'Dell reached Craig's house at about 7:30 a.m., he said he wanted to sleep, and he slept until 9:30 or 10:00 o'clock that evening. When O'Dell awakened, he asked Craig how to remove the blood from his new blue-gray jacket.

The next day, Thursday, about 1:00 p.m., O'Dell called Craig from his place of work and told her he had put his clothes in her garage, but he intended to take them out the following day. After the telephone

2. In an alibi inconsistent with the one he had given to Craig, O'Dell told the police the blood came from a nose bleed caused by being struck while attempting to stop a fight at another club on the night of February 5.

conversation, Craig read the local newspaper's account of the murder of Schartner. The account said the victim had last been seen at the County Line Lounge. When Craig remembered that O'Dell customarily visited the County Line Lounge on Tuesday nights, "something clicked." Craig went to her garage and found a paper bag containing four pieces of bloody clothing, including a pair of jeans which also had mud on them. Craig brought these clothes into the house and called the police.

Forensic evidence established that the dried blood on two of O'Dell's articles of clothing was the same type as Schartner's in each of the 11 blood classification systems analyzed. Only three out of a thousand persons are in this blood classification. O'Dell's blood was not the same type as Schartner's. O'Dell's car was later seized and searched, and dried blood found on objects in the car also had several enzyme markers consistent with Schartner's blood, but not O'Dell's.

During his incarceration, O'Dell told Steven Watson, a fellow inmate, he had strangled Schartner after she refused to have sexual intercourse with him.

II

PRETRIAL MATTERS

A

Speedy Trial

[2] After the General District Court's finding of probable cause, O'Dell was incarcerated for 18 months before his trial commenced. Citing this delay, O'Dell claims violations of both constitutional and statutory speedy trial protections. We find no merit in either claim.

If the delay in the commencement of trial is attributable to a defendant, there is no violation of his constitutional right to a speedy trial. *See Barker v. Wingo*, 407 U.S. 514, 528-29, 92 S.Ct. 2182, 2191, 33 L.Ed.2d 101 (1972); *Stephens v. Commonwealth*, 225 Va. 224, 230, 301 S.E.2d 22, 26 (1983). Code § 19.2-243 requires that the trial of an incarcerated defendant commence within five months after probable cause is found. This statutory requirement, however, does not apply to delays caused by continuances granted on the incarcerated defendant's motion.

The orders in the record show O'Dell requested the following continuances of the trial: May 16, 1985 to August 20, 1985; September 24, 1985 to November 12, 1985; November 12, 1985 to February 10, 1986; February 10, 1986 to March 31, 1986; March 31, 1986 to June 30, 1986; June 30, 1986 to August 11, 1986, or a total of approximately 14 months. Because only four months of the period are chargeable to the Commonwealth, we find no constitutional or statutory violation of O'Dell's speedy trial rights.

B

Suppression Motion

[3] O'Dell moved the trial court to suppress the introduction of his clothing in evidence because of a police search and seizure allegedly in violation of his constitutional rights. O'Dell's grounds for suppression ignore the facts here and the controlling constitutional principles.

First, O'Dell contends Craig's consent to the police search of her garage was invalid because of his expectation of privacy in the garage. Craig had ordered O'Dell to leave her house a week before the search, and thereafter he had been living in his car. A few days after she evicted O'Dell, Craig put the clothing he had left in her house on her front porch. When O'Dell called her the afternoon before the murder, Craig told O'Dell his clothes were on the front porch. Some time after the murder, between 2:00 a.m. and 7:00 a.m., O'Dell came by Craig's house and picked up his clothes. O'Dell changed clothes, put his bloody clothes in a paper bag, and placed the bag in Craig's garage.

We need not decide whether O'Dell had an expectation of privacy in the garage. Craig, an owner with a joint right to possession, had the right to consent to its search. *See United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974); *cf. Chapman v. United States*,

365 U.S. 610, 617-18, 81 S.Ct. 776, 780, 5 L.Ed.2d 828 (1961) (landlord whose tenant had *not* forfeited his right to exclusive possession of the premises cannot consent to search of demised premises).

O'Dell next contends the police officers violated his constitutional rights in ordering Craig to remove his bloody clothes from the paper bag he had left in the garage. O'Dell's reference to the record, however, shows that Craig had already removed the clothing from the bag, and the clothing was on her kitchen floor when the officers arrived.

C

Discovery Matters

(1) *Failure to Provide Reciprocal Discovery*

[4] O'Dell was required to disclose information about his experts to support his request for the Commonwealth's payment of those experts because of O'Dell's indigency. Apparently recognizing that a defendant has no general constitutional right to discovery in a criminal case, *see Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977); *Watkins v. Commonwealth*, 229 Va. 469, 479, 331 S.E.2d 422, 430-31 (1985), *cert. denied*, 475 U.S. 1099, 106 S.Ct. 1503, 89 L.Ed.2d 903 (1986), O'Dell argues that he had a constitutional right of reciprocal discovery under the facts of this case, requiring the Commonwealth to furnish not only the names of all its experts but the substance of their expected testimony.[3]

O'Dell had extensive pretrial information about the background and conclusions of the Commonwealth's expert who did the blood testing, but O'Dell contends he did not know the Commonwealth planned to use three experts to establish the general scientific acceptance of a technique used to analyze and type samples of dried blood known as "multisystem electrophoresis." Nine months before trial, O'Dell knew the Commonwealth's forensic analysts intended to use an electrophoretic technique to identify the dried blood stains on his clothing as being consistent with the blood of Schartner. O'Dell also was aware of the Commonwealth's burden to establish the general acceptance of this technique in the scientific community. In fact, as early as seven months before trial, O'Dell was in contact with Dr. Benjamin Grunbaum, one of the experts O'Dell planned to use to attack the use of electrophoresis on dried blood samples. At least three and a half months before trial, O'Dell was also in contact with another forensic scientist, Dr. Diane Lavett. O'Dell requested an out-of-state witness summons for each of these parties a month before trial.

Dr. Lavett did testify at the trial that the scientific community had not accepted this technique of typing dried blood samples. Dr. Grunbaum could not appear because of a scheduling conflict. Assuming, but not deciding, that the Commonwealth should have furnished O'Dell with its experts' names and the substance of their expected testimony before trial, we conclude that this failure caused no prejudice to O'Dell, who had already contacted his own experts in the field.

(2) *Watson's Plea*

[5] O'Dell claims he was improperly denied discovery of a plea agreement he alleged existed between the Commonwealth and its witness Steven Watson. He cites *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), in support of his right of such discovery. Neither case indicates a defendant has a right to discover the existence or contents of a plea agreement prior to trial. Instead, these cases turn upon undisclosed plea agreements with witnesses who had *already* testified. There is no general constitutional right to such pre-trial discovery in a criminal case. *See Weatherford*, 429 U.S. at 559, 97 S.Ct. at 845; *Watkins*, 229 Va. at 479, 331 S.E.2d

3. Obviously, none of this is required under Rule 3A:11(b). *See Lowe v. Commonwealth*, 219 Va. 670, 678-79, 250 S.E.2d 112, 117-18 (1977), *cert. denied*, 435 U.S. 930, 98 S.Ct. 1502, 55 L.Ed.2d 526 (1978).

at 430. The trial court correctly denied this discovery.[4]

D

Failure to Preserve Evidence

[6] O'Dell claims the trial court should have excluded the electrophoretic test results because the Commonwealth failed to preserve properly the blood-stained clothing for his independent testing, in violation of his constitutional rights. O'Dell also asserts the Commonwealth's expert, who performed the testing, did not properly document all her procedures.

The evidence at trial demonstrated that after a few weeks dried blood cannot be successfully tested unless it has been kept under refrigeration. O'Dell moved for an independent examination months after the Commonwealth performed its tests. The Commonwealth does not usually keep seized articles under refrigeration after it has analyzed them, and it did not do so in this case. The Commonwealth stored the clothing in a routine manner, but, because the blood stains had deteriorated, O'Dell's experts did not have an opportunity to run independent tests.

O'Dell argues his constitutional rights were violated because an independent examination may have proven favorable to him, and a review of the test procedures which should have been documented may have demonstrated errors in the Commonwealth's testing. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963), the Supreme Court held that a state must disclose to an accused all favorable evidence material to his guilt or punishment. In *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), the Supreme Court concluded that, in the absence of, bad faith, deviation from normal practice, official animosity toward an accused, or a conscious effort to suppress exculpatory evidence, a state's failure to preserve evidence seized in a criminal case is not a violation of a defendant's constitutional rights unless the evidence "both possess[ed] an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S.Ct. at 2534.

Assuming, but not deciding, that a duty to preserve the condition of evidence and to document test procedures is the same as a duty not to destroy evidence, O'Dell failed to show any of the *Trombetta* conditions for excluding this evidence. We find no bad faith, deviation from routine, official animosity toward O'Dell, or conscious effort to suppress exculpatory evidence. Nor has O'Dell shown that the evidence possessed an apparent exculpatory value before it was placed in storage; to the contrary, the test results indicated the blood on his jacket was that of Schartner. While O'Dell did not have an opportunity to have independent tests performed on the articles, he had, and used, other means to challenge the validity of the tests the Commonwealth performed. The Commonwealth examiner's records were made available to O'Dell's experts, and O'Dell made full use of them in presenting his challenges to the testing procedure.

We find no violation of O'Dell's constitutional rights in the manner of testing or storage of the evidence.

E

Expert Witnesses

O'Dell complains of the trial court's rulings on a number of matters dealing with expert witnesses. We find no merit in any of his complaints for the reasons which follow.

On O'Dell's motion, the trial court appointed Dr. Joseph Guth, a forensic scientist, to assist him. In justifying his need for the expert, O'Dell specifically mentioned the necessity for an independent survey of hair and blood samples, tire and foot casts, and laboratory techniques used in analyzing this evidence. Dr. Guth did considerable work on some of these matters, his investigation extended over a number of months, and necessitated a number of postponements of the trial date. When Dr. Guth released his tentative report to O'Dell, O'Dell was dissatisfied with at least one conclusion. O'Dell made a motion *in limine* to prevent the Commonwealth from seeing that portion of the report which was unfavorable to O'Dell. O'Dell indicated he would examine Dr. Guth only on his investigation of the blood stains and moved, therefore, that the Commonwealth's access to the report should be limited to Dr. Guth's analysis of the blood stains.

[7] The permissible scope of cross-examination of a witness is a matter of discretion by a trial court. *See Bunch v. Commonwealth*, 225 Va. 423, 438, 304 S.E.2d 271, 279-80 (1983). O'Dell has shown no abuse of discretion in this case.

[8, 9] O'Dell claims he was entitled to an *ex parte* hearing on the necessity of the Commonwealth's funding of experts to assist him in his defense. O'Dell admits none of the proposed experts would address the question of his sanity, as in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); they were all forensic scientists. O'Dell had no constitutional right requiring the Commonwealth to provide funding of this type of expert assistance. *Townes v. Commonwealth*, 234 Va. at 332, 362 S.E.2d at 664; *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied*, 484 U.S. ——, 108 S.Ct. 2097, 98 L.Ed.2d 158 (1987).

O'Dell argues that the trial court permitted an "overloading of prosecution experts." Neither the Supreme Court case of *Ake*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, nor any of the other cases O'Dell cites, deals with an alleged "overloading of prosecution experts."

We find no logical or constitutional reason for adopting a *per se* rule requiring the Commonwealth to furnish an indigent defendant with a number of experts equal to the number the prosecution may call. If the Commonwealth provided O'Dell with the "basic tools of an adequate defense," *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971), it complied with the constitutional requirements. The Commonwealth need not supply O'Dell with all services that may be available. *See Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2446-47, 41 L.Ed.2d 341 (1974). The testimony of Dr. Guth and Dr. Lavett, the experts supplied to O'Dell by the Commonwealth, and the detailed, articulate, and informed cross-examination of the Commonwealth's experts by court-appointed counsel give ample evidence of the "basic tools of defense" supplied to O'Dell.

O'Dell cites the case of *United States v. Bass*, 477 F.2d 723, 725 (9th Cir.1973), as "condemning appointment of expertise disproportionately to prosecution." In fact, the *Bass* court merely held that a defendant who is tried in a federal court is entitled to his own psychiatric expert under a specific federal statute. In *Bass*, the government already had two psychiatric experts, yet the court said nothing *whatever* about that being a disproportionate number, although the trial court had appointed only one psychiatrist to assist the defendant.

The trial court had the discretion to decide whether O'Dell needed an expert or experts, and the burden is on O'Dell to show that this discretion was abused. *See Quintana v. Commonwealth*, 224 Va. 127, 136, 295 S.E.2d 643, 648 (1982). O'Dell has not carried that burden.

Additionally, we note that O'Dell moved for additional experts only a short time before trial. If the trial court had granted the motion, it would have necessitated yet another continuance. The motion for an expert must be made in a timely fashion. *Moore v. Kemp*, 809 F.2d 702, 710 (11th Cir.), *cert. denied sub nom. Moore v. Kemp*, — U.S. ——, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987).

F

O'Dell's Representation

(1) *Discharge of Peter Legler*

[10] O'Dell objected to the discharge of his court-appointed counsel, Peter Legler.

4. At trial, the court permitted O'Dell to fully develop all pre-trial contacts and negotiations Watson had with the Commonwealth. O'Dell was unable to prove a plea agreement existed between Watson and the Commonwealth.

O'Dell argues not only was he denied the benefit of Legler's participation as counsel, but he was also denied a hearing as to the "reasons . . . or ramifications" of such disqualification of counsel.

We reject O'Dell's contentions. Legler requested to withdraw because of a potential conflict of interest in Legler's representation of O'Dell and another of his clients. Apparently, Legler's other client was a man named David Pruett who, according to O'Dell, had confessed to the Schartner murder. While O'Dell was willing to waive the conflict, there is no showing that Pruett was. Where one lawyer represents multiple clients with divergent interests, *all* clients must waive the potential conflict of interest in order for the attorney to proceed. DR 5-105(C); *see* DR 5-101(B). O'Dell had no right to force Legler to continue as counsel under these circumstances.[5]

The case of *In re Paradyne Corp.*, 803 F.2d 604 (11th Cir.1986), which O'Dell cites, is inapposite. That case involved counsel who were *willing* to continue to represent the defendant, but who were forced by the trial court to withdraw because of an alleged conflict of interest. *Id.* at 608-09. Legler *wanted* to withdraw.

(2) *Standby Counsel's Alleged Conflict of Interest*

[11] Next, O'Dell claims Paul Ray, standby defense counsel appointed to succeed Legler, acquired a conflict of interest during his representation of O'Dell which disqualified him. Ray sought the appointment of a psychiatrist to determine O'Dell's mental state at the time of the murder, his competence to stand trial, and his future dangerousness. O'Dell resisted the examination. Ray responded:

> [T]his defendant is apparently telling the court he does not want a psychiatric evaluation. If that is true, then he should be put under oath and I should examine him on the record because I don't want to get into any problem further on down the road in regard to this particular issue, but I just put that to the Court.

O'Dell assumes Ray desired to protect himself against a later charge of ineffective assistance of counsel, and asserts this gave rise to the alleged conflict of interest. O'Dell quoted (and designated for printing in the appendix) only a part of what Ray said, and we think O'Dell misinterpreted what Ray meant. Our reading of Ray's entire statement convinces us that he was referring to the possibility that O'Dell might later claim he was incompetent to stand trial.

Even if Ray's reason was a desire to protect himself against a later charge of ineffective assistance of counsel, we do not believe that reason, standing alone, constitutes a conflict of interest warranting disqualification. O'Dell cites no case which supports his contention. His reliance upon *United States v. Ellison*, 798 F.2d 1102 (7th Cir.1986), is misplaced. In *Ellison*, the court, considering a claim of ineffective assistance of trial counsel, held that trial counsel had a conflict of interest which precluded him from testifying against the defendant *and* representing him at the same time. Accordingly, we find O'Dell's argument without merit.[6]

(3) *Failure to Appoint Standby Co-Counsel*

O'Dell's complaint of the trial court's failure to appoint co-counsel to act with Ray is premised on Ray's alleged conflict of interest. That premise having failed, we reject this assignment of error.

(4) *Warnings of Self-Representation*

[12] Relying upon *Superintendent v. Barnes*, 221 Va. 780, 273 S.E.2d 568 (1981), O'Dell asserts he was not adequately warned of the dangers of self-representation. Unlike that case, in which the trial court never warned the defendant of such dangers, the record in this case is replete with the trial court's warnings to O'Dell. Moreover, as we noted in *Barnes*, the Supreme Court "has never held that the absence of such a cautionary instruction, standing alone, defeats a waiver." 221 Va. at 784, 273 S.E.2d at 561. Additionally, O'Dell's extensive experience in the criminal justice system and his demonstrated skill in raising objections in this trial belie any claim now that he did not understand the dangers of self-representation. For these reasons, we reject this argument.

III

JURY MATTERS

A

Unilateral Right to Reach Trial

[13] O'Dell extrapolates from his constitutional right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), or to represent himself, *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), and his constitutional rights to a jury trial, U.S. Const. amend. VI; Va. Const. art. I, § 8, a constitutional right to demand a trial by a judge. O'Dell overlooks the Commonwealth's interest.

While the Commonwealth has no voice in O'Dell's decision as to who will defend him, it does have an equal voice with O'Dell in the decision whether the case will be tried by a judge. Va. Const. art. I, § 8; *Pope v. Commonwealth*, 234 Va. 114, 122, 360 S.E.2d 352, 358 (1987). Accordingly, we reject this contention.

B

Venire Not a Valid Cross-Section

[14] We deny O'Dell's various challenges to the venire for several reasons:

(1) O'Dell introduced no evidence to substantiate his claim that the venire was unrepresentative of the community. His reference to census figures in footnotes to his brief, even if they supported his claim, did not make these figures a part of the evidence. *See Lockhart v. McCree*, 476 U.S. 162, 173, 106 S.Ct. 1758, 1764, 90 L.Ed.2d 137 (1986); *Reid v. Commonwealth*, 210 Va. 369, 373, 171 S.E.2d 162, 165 (1969).

(2) O'Dell asserts the trial court erred in directing the clerk not to draw jurors who had served on a capital murder case during the then-current term. The clerk apparently misunderstood and excluded the first 24 veniremen who had served on any criminal case during that term, but the clerk did not exclude such persons from the next 28 veniremen who were drawn. O'Dell makes no showing of prejudice arising from these matters.

Also, O'Dell overlooks the provisions of two Code sections in claiming these actions of the trial court and the clerk violated Code §§ 8.01-349, -350.1, -351, and -352 and compel a new trial. Code § 8.01-355 permits the trial court to excuse any jurors whose names were drawn for service on a particular panel and, thus, authorizes the trial court's direction to the clerk. The clerk's misunderstanding of the trial court's direction and the subsequent exclusion of all jurors who had served on any felony panel in the then-current term was an irregularity under Code § 8.01-352(A), which is cured under Code § 8.01-352(B), because the exclusion was not intentional, nor did it operate to cause any prejudice to O'Dell. Accordingly, we find no reversible error in the selection of the venire.

C

Failure to Allow Additional Challenges

O'Dell argues that he should have been permitted an unspecified number of additional peremptory challenges because a number of prospective jurors had ties to the military or law enforcement. No Virginia or Federal authority supports this assignment of error, and since O'Dell failed to show deficiencies in the composition of the jury, we reject his claim of entitlement to additional challenges.

D

Questions to Venire by Court and Commonwealth's Attorney

(1) *Comments Regarding Jury's Role in Death Penalty*

[15] O'Dell contends both the Commonwealth's Attorney and the trial court al-

5. The complaint that O'Dell was not adequately warned of the dangers of waiving counsel with a conflict of interest has nothing to do with this case. O'Dell did not waive the conflict, and the trial court released counsel with the conflict from representation of O'Dell.

6. At various times during the proceedings in the trial court, O'Dell complained about the quality of Ray's representation. After all the evidence was submitted in the guilt phase, O'Dell told the trial court: "I think Mr. Ray has done an outstanding job, which is contradictory to all my allegations previously."

tempted to diminish the jury's sense of responsibility in this capital case by stressing that the jury would merely recommend the death penalty rather than actually "impose" it. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court prohibited comment by a trial court or argument by a prosecutor that the jury's determination of a d. th sentence is automatically appealable. In *Frye v. Commonwealth*, 231 Va. 370, 397, 345 S.E.2d 267, 286-87 (1986), the Commonwealth's Attorney argued to the jury that the responsibility for fixing the death sentence was not the jury's, but that of the court. The trial court overruled a defense objection, stating in the jury's presence that its verdict would be a recommendation. We reversed, citing *Caldwell*.

The trial court and the Commonwealth's Attorney did make statements to the venire in voir dire to the effect that the jury would "recommend" the sentence. These statements, which were a small part of the information given to the jury, were never repeated in the trial. A review of the entire record shows that the jury explicitly was told it actually *fixed* the punishment, as the first instruction and the form of the verdict clearly stated. Therefore, we find no prejudicial error in these remarks.

(2) *Nature of Commonwealth's Voir Dire Questions*

[14] The trial court and the Commonwealth's Attorney asked fewer questions of the venire designed to eliminate those veniremen favoring an automatic death sentence upon a capital murder conviction than they did to eliminate those veniremen unalterably opposed to a death sentence. O'Dell argues that, taken as a whole, these questions were, therefore, "slanted so as to impress the jury with the probability of the death penalty in an unconstitutional manner." O'Dell cites *Patterson v. Commonwealth*, 222 Va. 658, 283 S.E.2d 212 (1981), in support of this argument. In *Patterson*, we held it was error for a trial court to refuse to ask any questions testing a juror's prejudice toward automatic death sentences in capital murder cases. *Id.* at 658-59, 283 S.E.2d at 216. Our review of the questions asked in this case by the trial court and Commonwealth's Attorney does not reveal an effort to impress the jury with the probability of the imposition of the death penalty. We decline to establish a rule requiring an equal number of questions to be posed during voir dire on opposing issues, so long as each issue is fairly developed.

(3) *Commonwealth's Comments on O'Dell's Testifying*

[17] O'Dell is in error when he claims the Commonwealth's Attorney "went into extensive discourses [to the venire] on the merits of Mr. O'Dell taking the stand." O'Dell cites only one instance to support his claim. The "discourse" occurred after O'Dell had asked venireman Villandre the following questions:

MR. O'DELL: You as a fair-minded citizen, after the Commonwealth has presented its version of the case, would you expect to hear the defendant's side of the case?

MR. VILLANDRE: Yes.

MR. O'DELL: Would you expect the defendant to take the stand and testify?

MR. VILLANDRE: According to the judge, he doesn't have to.

MR. O'DELL: Yes, sir. If the defendant did not testify, would you think that he was trying to hide something or would that indicate to you in any kind of way that he was guilty?

MR. VILLANDRE: I would try to think it did not.

MR. O'DELL: Would there be some doubt in your mind—the fact that the defendant is defending himself and the fact that he didn't take that stand? It's kind of premature I guess for me to ask you this, but do you think that it would in any kind of way affect your impartiality?

MR. VILLANDRE: There is a possibility that it might. As you said, that is a very difficult thing.

O'Dell opened the door on the subject, requiring the Commonwealth to ask a series of questions intended to make it clear to prospective juror Villandre that no negative inference could be drawn from O'Dell's failure to testify.

Accordingly, we reject this contention.

E

Retention or Exclusion of Veniremen

O'Dell argues the trial court erroneously retained some veniremen, and erroneously excluded others. The trial court saw and heard the examination of each veniremen, and its findings are entitled to great weight. We will not reverse those findings on appeal unless manifest error has been shown. *Gray*, 233 Va. at 339, 356 S.E.2d at 171; *see Wainwright v. Witt*, 469 U.S. 412 at 431, 105 S.Ct. 844 at 856, 83 L.Ed.2d 841 (1985). No such error has been shown in any of the following instances on which O'Dell bases his claim.

(1) *Claimed Errors in Retention*

O'Dell assigns error to the trial court's retention of a number of prospective jurors on the panel despite various alleged disqualifications.

[18] O'Dell contends Mr. Eisenburg was disqualified because of an interest in the outcome of the case. Eisenburg was an alternate who was struck (presumably by O'Dell). Because none of the alternates who heard the evidence participated in the jury's deliberations, the error, if any, was harmless. *Gray*, 233 Va. at 339, 356 S.E.2d at 171.

[19] O'Dell challenges the retention of two veniremen, Mr. Thurston and Mr. Villandre, on the panel because they allegedly could not "totally disregard the effect of [O'Dell's] assertion of his Fifth Amendment [privilege against self-incrimination] and would not give him the benefit of the presumption of innocence." O'Dell argues that Thurston's answers to the following question propounded by O'Dell established Thurston's unwillingness to give O'Dell the benefit of his constitutional rights.

MR. O'DELL: ... The fact that the defendant was arrested and indicted by the grand jury of Virginia Beach—does that make you feel that he knows something about the crime or that he is guilty of the crime?

MR. THURSTON: Not that he is guilty. That he may know something about it because otherwise he would not have been indicted. There must be some doubt in someone's mind.

Thurston's other statements made it abundantly clear that Thurston would accord O'Dell his constitutional rights, and we find nothing in this exchange which demonstrates an inference of guilt from O'Dell's arrest and indictment.

O'Dell objected to Mr. Foust as a venireman because Foust said he would give a police officer's testimony more weight than that of the average citizen. Foust responded in the affirmative to the following questions:

MR. O'DELL: [I]f a police officer was to take the stand and testify to certain facts in this case and you listened to his testimony real closely and an average citizen came in and testified on the stand, would you give that police officer's testimony more weight than you would the average citizen?

MR. O'DELL: If that police officer's testimony conflicted with someone else's testimony that was not a police officer, would you tend to believe the police officer more so than the other person?

[20] Bias cannot be presumed solely because a prospective juror believes a police officer's training and experience in observing and recounting events might make the officer's account more accurate than that of an ordinary witness, provided the prospective juror does not ignore differing circumstances of observation, experience, and bias which may be disclosed by the evidence. Foust's freedom from bias was abundantly clear in this record. For that reason, we reject O'Dell's contention that Foust had a bias in favor of police testimony.

(2) *Claimed Errors in Exclusion*

[21] O'Dell contends the trial court erroneously excluded the following three members of the jury panel for cause. We disagree for the reasons which follow.

O'Dell says the trial court struck Mrs. McClellan as soon as she stated that she would require a "moral certainty" to convict rather than a "reasonable doubt." On the contrary, the record discloses two pages of testimony following Mrs. McClellan's statement in which O'Dell unsuccessfully attempted to rehabilitate McClellan. Although O'Dell argued at trial that his subsequent questions "covered the beyond a reasonable doubt aspect of the case," our review of the transcript reveals that O'Dell never asked McClellan if she would apply the reasonable doubt standard.

The record also indicates a number of instances when McClellan paused or failed to answer important questions on voir dire, as well as her considerable ambivalence about imposing the death penalty and her significant equivocation about her understanding of the standard of proof required in this case.

Both Mrs. Jones and Mr. Fiutko indicated they might not be able to follow the court's instructions because of their feelings about the imposition of the death penalty. A juror may be struck from the panel under the Federal Constitution if his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980); *see Lockhart*, 476 U.S. at 174, 106 S.Ct. at 1765; *Wainwright v. Witt* 469 U.S. at 424, 105 S.Ct. at 852.

IV

GUILT PHASE

A

Evidentiary Questions

(1) *Admission of Electrophoretic Tests*

O'Dell argues the court improperly admitted in evidence the results of the electrophoretic tests, and assigns a number of grounds in support of his argument. We find none of them to have merit.

[22] First, O'Dell argues that he was entitled to a separate hearing out of the presence of the jury to enable the trial court to make a determination of the admissibility of the test results. A separate hearing is generally advisable to avoid a possible mistrial in the event a trial court concludes the tests are not sufficiently reliable to be introduced in evidence. Because we find the trial court did not err in admitting in evidence the results of the electrophoretic tests, we conclude that O'Dell has not been prejudiced by the trial court's failure to conduct a hearing out of the jury's presence.

[23] Second, O'Dell contends the Commonwealth failed to show the use of the electrophoretic technique on dried blood stains was generally accepted by the scientific community or sufficiently reliable for the results to be admissible in evidence. He urges upon us the so-called "*Frye* test," contending that a trial court must be convinced not only of the reliability of the test, but also of its general acceptance by the scientific community in the particular field in which the test belongs. *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923). The "*Frye* test" has generated considerable criticism. *See, e.g.*, Maenaeus, *Admissibility of Scientific Evidence—An Alternative to the Frye Rule*, 25 Wm. & Mary L. Rev. 545 (1984).

We see no reason to adopt the *Frye* test. Even if it were the law in Virginia, the evidence was sufficient to meet it.[7] The testimony of Dr. George Sensabaugh, a professor of biomedical and environmental health sciences at the University of California, with extensive experience in the field of forensic biology and medical microbiology, indicated the multisystem method of electrophoresis used to test Schartner's blood and O'Dell's blood was reliable and generally accepted in the field of forensic science. O'Dell's second argument, that the evidence of a test's reliability and acceptance must come from an "independent" expert, is also met. Dr. Sensabaugh was such an "independent" expert, and, therefore, met this condition.

[24] O'Dell's third argument centers upon the reliability of the method used to perform the tests on the dried blood samples, the experience and competence of the examiner who performed the tests, and the manner in which she did the tests. Each side introduced evidence supporting its respective positions on these issues.[8] All three of these questions were factual issues involving the weight of the evidence rather than its admissibility, and were properly resolved by the jury. *See Ellis v. International Playtex, Inc.*, 745 F.2d 292, 303 (4th Cir.1984); *cf. Walrod v. Matthews*, 210 Va. 382, 389, 171 S.E.2d 180, 186 (1969).

(2) *Witness Watson*

O'Dell maintains the trial court should have allowed him to cross-examine Watson about letters Watson had written to three Virginia circuit court judges a number of years prior to this crime. O'Dell did not tender the letters as exhibits, and we find none of them in the record. Therefore, we must assume the trial court correctly ruled that the letters were not sufficiently relevant to show Watson's bias. Furthermore, the trial court made it clear at the time of its ruling that O'Dell was not precluded from introducing any other evidence which might show Watson solicited leniency in the terms of his probation in exchange for his testimony.

O'Dell argues Watson was not permitted to answer his question, "Did you tell Larry Talkington, your codefendant in that case you were extradited back on, in forty or fifty other B & E's, breaking and enterings,[9] that if you got caught you would *like* to keep yourself from going to jail because you had been there before?" (Emphasis added.) When the Commonwealth's objection to the question was argued before the trial court, O'Dell said his question was, "Did you tell Larry Talkington, your codefendant in that instance that you was extradited back on, that if you got caught you would *lie* to keep from going to jail in those forty or fifty B and E's because you had been to jail there before?" (Emphasis added.)

[25] We will not speculate what the answer might have been to these questions. The answers were not proffered for the record. Furthermore, when O'Dell put Talkington on the stand, he never asked Talkington about Watson's alleged statement. We will not consider testimony which the trial court has excluded without a proper showing of what that testimony might have been. *Wyche v. Commonwealth*, 218 Va. 899, 843, 241 S.E.2d 772, 775 (1978); *Whittaker v. Commonwealth*, 217 Va. 966-968-69, 234 S.E.2d 79, 81 (1977).

Likewise, we will not consider O'Dell's objection to the trial court's refusal to permit Talkington to testify as to whether Watson had ever been a police informant. No answer was proffered. Although O'Dell complains he "was not even permitted to proffer the questions he wished to pursue on this line," the record shows that the trial court merely refused to delay jury proceedings for the proffer; O'Dell could have made the proffer after the jury retired. Later, without having made the proffer, O'Dell asked that Talkington be

7. We note O'Dell's argument that the trial court merely took judicial notice of the reliability of the electrophoretic technique. The trial court, when describing the grounds for admitting the tests, said "The Court has ruled and taken judicial notice that the procedural concept of electrophoresis is generally accepted. I think Dr. Sensabaugh has more than shown that it is generally accepted in the United States."

Judicial notice involves the admission of a fact in evidence without proof of that fact because it is commonly known from human experience. *Darnell v. Baker*, 179 Va. 86, 93, 18 S.E.2d 271, 275 (1942). The trial court's full statement indicates it did not take judicial notice of the reliability of the electrophoretic technique; instead, it found it as a fact, based on the testimony of Dr. Sensabaugh.

8. O'Dell's evidence came primarily from Dr. Elmer Lovett, a forensic scientist. O'Dell cites a number of articles and studies in various publications allegedly questioning the validity of the tests. These articles apparently contain factual information and conclusions and could only be considered by the court after being properly placed in evidence. *Cf. Hopkins v. Commonwealth*, 190 Va. 389, 396-97, 56 S.E.2d 890, 893-94 (1950). None of the articles and studies was introduced in evidence and, therefore, we do not consider them.

9. O'Dell later admitted he was wrong in characterizing the charges as 40 or 50 B & E's, there were only four or five B & E's.

excused. Accordingly, we will not consider O'Dell's complaint of a denial of proffer.

B

Other Rulings as to Witness Watson

O'Dell characterizes Watson's conflicting statements concerning the number of his prior felony convictions as perjury. At one time, out of the presence of the jury, Watson said he had six convictions, and later, before the jury, he correctly said he had seven convictions. O'Dell did not question Watson's explanation of his confusion as to a seventh conviction on concurrent charges in West Virginia. The jury was given the correct number of Watson's convictions, and O'Dell suffered no prejudice.

O'Dell is wrong in his claim that the trial court refused to hold a hearing to determine the admissibility of Watson's evidence. The appendix and transcript reflect that the trial court held a separate hearing in which O'Dell fully exercised his opportunity to question Watson and to argue the matter of admissibility.

C

Instruction

[26] O'Dell assigns error to the inclusion of the italicized language in the following instruction:

> The Court instructs the jury the defendant is presumed to be innocent. You should not assume the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. *This does not require proof beyond all possible doubt, nor is the Commonwealth required to disprove every conceivable circumstance of innocence.* However, suspicion or probability of guilt is not enough for a conviction.
>
> There is no burden on the defendant to produce any evidence.
>
> A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the evidence in the case.

We find this language properly balanced the instruction as to what constitutes proof beyond a reasonable doubt. Moreover, we find the disputed language is consistent with the language of the standard instruction on circumstantial evidence the trial court gave the jury. We conclude that the trial court did not err in granting this instruction.

D

Sufficiency of the Evidence to Convict

O'Dell, characterizing the case against him as "non-existent" apart from the serological evidence, argues the court should have directed the verdicts of acquittal on all three indictments. Because the trial court properly admitted the serological evidence and because there was other evidence to support the conviction, we need not consider this assignment of error. We find the evidence adduced at trial to be sufficient to convict O'Dell of all three crimes.

V

PENALTY PHASE

A

Admissibility of Evidence of Future Dangerousness

(1) *Unadjudicated Crimes and Juvenile Findings of Not Innocent*

[27] O'Dell objects to the admission of evidence of a prior attempted rape in Florida, claiming the Florida court dismissed the charge on the merits prior to trial for lack of evidence. In support, O'Dell proffers only his unsworn statement during trial that "[t]he sexual battery was dropped, Your Honor, by the Court." O'Dell's statement is not sufficient to show an *adjudication* of the charge. O'Dell filed the record of the proceeding in Florida, but the trial court did not admit it in evidence because O'Dell failed to have it properly authenticated. Nonetheless, we have reviewed the Florida record and find no reference to a dismissal of the attempted rape charge on the merits.

O'Dell argues that evidence of unadjudicated crimes and juvenile findings of not innocent are not admissible in the penalty stage of trial. We adhere to our consistent position that "a trier of fact called upon to decide whether or not to impose the death sentence is entitled to know as much relevant information about the defendant as possible." *Beaver v. Commonwealth*, 232 Va. 521, 529, 352 S.E.2d 342, 347, *cert. denied*, 483 U.S. ——, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987) (juvenile offenses and unadjudicated criminal activity held admissible in penalty phase of capital murder case). Accordingly, we reject O'Dell's contentions.

(2) *Convictions More than 10 Years before this Conviction*

[28] O'Dell suggested at trial that Rule 609(b) of the Federal Rules of Evidence precluded the introduction of evidence of convictions more than 10 years before the subject crime. We have no such rule.

O'Dell cites no authority indicating the admission of such prior convictions presents constitutional issues. The only case he cites in support of his proposition is *State v. Beal*, 311 N.C. 555, 565, 319 S.E.2d 457, 563 (1984), which turned on a construction of North Carolina and Alabama statutes, and did not involve the constitutional issue O'Dell raises. There is no merit in this argument.

B

Admission of Evidence of Vileness

O'Dell did not brief his assignment of error dealing with the admission of evidence of the "vileness" of the murder and, therefore, we will not consider it. Rule 5:27(e). He does assign separate error and argue that an instruction on vileness "was fatally duplicitous." We need not rule on this contention because the jury did not base its verdict on the vileness predicate.

C

Exclusion of Mitigating Evidence

[29] O'Dell argues that he was entitled to introduce evidence and to have the jury instructed that in the event he received a life sentence, he would not be eligible for parole. We have rejected similar arguments in our previous capital murder cases, and do so now for the reasons stated in those cases. *See Williams v. Commonwealth*, 234 Va. 168, 179–80, 360 S.E.2d 361, 368 (1987); *Payner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836–37, *cert. denied*, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 158 (1985).

D

Instructions on Mitigating Circumstances

O'Dell argues the trial court failed "to give the jury *any* guidance as to the nature and function of mitigating circumstances." O'Dell tendered copies of 22 instructions on mitigation which a defendant proffered in a capital murder case in the State of Georgia. He also tendered an annotation of eight of Mississippi's model jury instructions drafted for use in the sentencing phase of trial and a North Carolina jury form of interrogatories on mitigation. We find the trial court correctly refused to give these purported instructions because they did not correctly state Virginia law, or they submitted principles of law inapplicable to the facts in this case. The instructions granted sufficiently covered the subject of mitigation.

E

Admission of Hearsay

[30] O'Dell now objects to the pretentence report as "inaccurate hearsay." His objection to the report at trial was limited to the information elicited from his sister, who he said had "no knowledge of it. Anything she says is completely hearsay." Although the trial court afforded O'Dell an opportunity to correct any misstatements in the report, and he did so as to other statements, he never said his sister's statements were "inaccurate," only that they were "completely hearsay." During the sentencing phase of a capital murder case, the court may consider hearsay evidence, favorable or unfavorable to the defendant, contained in a pretentence report. This is implicit from the language of Code § 19.2-264.5 and Code § 19.2-299, which permit a probation officer "to thoroughly investigate and report upon the history of the accused and any other and all other relevant facts."

O'Dell also contends the person who prepared the report was not called as a witness. The record shows that Sandra E. Mann, the probation officer who prepared the report, did testify, and O'Dell cross-examined her. This is in contrast to the case O'Dell cites, *Gardner v. Florida*, 430 U.S. 349, 356, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977), in which the trial court did not even show the defendant the presentence report, let alone afford him an opportunity to cross-examine the person who prepared it. We reject O'Dell's contentions on this issue.

VI

MISCELLANEOUS ISSUES

A

Restrictions on O'Dell's Right to Defend Himself

[31] O'Dell complains that "Ray's interference in the trial . . . violated" his right to represent himself. Specifically, he contends it destroyed the jury's perception that O'Dell was representing himself. *See McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 951, 79 L.Ed.2d 122 (1984).

The trial court told the jury O'Dell was acting as his own attorney[9], but Ray, as standby counsel, would assist O'Dell. O'Dell cites no instance in the trial in which Ray did not defer to O'Dell's decisions in presenting his defense. In fact, the record reflects Ray deferred to O'Dell in every instance of disagreement. A reading of the entire record convinces us that O'Dell clearly and convincingly projected the image of self-representation to the jury. O'Dell conducted the *voir dire* examination of 31 of the jurors, and made the opening statement, in which he told the jury he was a *pro se* defendant. O'Dell conducted extensive cross-examination of eight of the Commonwealth's key witnesses, and the direct examination of five of the witnesses he called to the stand. Additionally, he made many objections before the jury. The record leaves little doubt that O'Dell controlled all vital portions of his defense before the jury and before the court.[10] Ray's involvement was substantially less than that of standby counsel in *McKaskle*, and was well within the reasonable limits the United States Supreme Court articulated in *McKaskle*, 465 U.S. at 178, 104 S.Ct. at 951.

Neither of O'Dell's claims that the trial court erroneously restricted his closing argument in the penalty phase, and would not permit O'Dell to allocute to the jury before sentencing in violation of his constitutional rights have merit. O'Dell is wrong on the facts—the trial court did *not* restrict O'Dell from arguing his innocence in the penalty phase. The trial court merely said O'Dell was confined to arguing the evidence in the record, and could not argue evidence which had not been introduced. Allocution occurs before the court which pronounces the sentence, Code § 19.2-298; the jury does not sentence the defendant, it only "ascertains" the punishment in its verdict, Code § 19.2-295.

Over the Commonwealth's objection, O'Dell argued successfully for Ray's participation in the suppression hearings. The United States Supreme Court pointed out in *McKaskle*, "Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced." 465 U.S. at 183, 104 S.Ct. at 953. Our review of the record fails to disclose any objection to Ray's participation thereafter, except O'Dell's contention of Ray's alleged "conflict of interest."

[32, 33] O'Dell now claims Ray's interference denied him the opportunity to make his own closing statement. The trial court ruled that either O'Dell or his counsel, but not both, could make the closing argument. A trial court has broad discretion in the supervision of opening statements and closing argument. *See Jordan v. Taylor*, 209 Va. 43, 51, 161 S.E.2d 790, 796 (1968). We find no abuse of that discretion in limiting the number of persons who could argue on each side in this case.

We find O'Dell's allegations of impermissible restrictions on his right to defend himself to be meritless.

B

Prosecutorial Misconduct

O'Dell complains of prosecutorial misconduct, alleging a number of incidents before, during, and after the trial. We need not discuss each complaint. Some were simply not established by the record. Other alleged incidents O'Dell did not object to, nor did he move for a mistrial or request precautionary instructions at the time, preventing our review at this time. Rule 5:25; *see Blount v. Commonwealth*, 213 Va. 807, 811, 196 S.E.2d 693, 696 (1973). Finally, our review of the entire record convinces us that those minor deviations from a Commonwealth's Attorney's duty to conduct himself in a proper manner,[11] which O'Dell properly preserved for appeal, were clearly insufficient to deny him a fair trial.

C

"Heightened Reliability" Requirement

[34] O'Dell contends that a so-called "heightened reliability" standard created by the Eighth Amendment to the United States Constitution requires us to reverse his death sentence. We disagree. The standard of proof is beyond a reasonable doubt. There is no heightened reliability standard in a capital murder case. Nor do the cases relied upon by O'Dell support the existence of such a standard.

The only reason O'Dell gave supporting this assignment of error was that "[i]t is undisputed that David Pruett confessed to the crime long before trial." O'Dell does not refer to any supporting testimony in the record, only to his own unsworn statements indicating that he had *heard* Pruett admitted to his lawyer and minister he had murdered Schartner.

O'Dell had the trial court make arrangements so Pruett could testify, but then later requested the trial court to excuse Pruett. O'Dell attempts to justify his action by claiming Pruett had a Fifth Amendment privilege against self-incrimination. O'Dell ignores the effect of Code § 19.2-279, which would have compelled Pruett to testify. *Cunningham v. Commonwealth*, 2 Va.App. 358, 344 S.E.2d 389 (1986).

O'Dell also erroneously claims a "priest-penitent" privilege justifies his failure to present the testimony of the minister who allegedly heard Pruett's confession of Schartner's murder. Code § 19.2-271.3 creates a "priest-penitent" privilege in criminal cases, but limits the privilege to "information communicated to [the minister] by the accused." O'Dell, not Pruett, is the accused in this case.

We find no merit in this assignment of error.

VII

SENTENCE REVIEW

A

Propriety of Death Sentence

O'Dell claims the jury imposed the sentence of death "under the influence of passion, prejudice or any other arbitrary factor." O'Dell refers to nothing in the record in support of this argument, but Code § 17-110.1(C)(2) requires us to review the record to determine if the jury was so

9. O'Dell's motions encompass 702 pages of the appendix. Except for a limited number of typed pages, which standby counsel may have prepared, and copies of newspaper clippings, the balance is entirely in O'Dell's handwriting, amply evidencing his unrestricted self-representation.

11. One of the Assistant Commonwealth's Attorneys wrote a letter to an expert witness for the defendant after the trial was over, criticizing her testimony. We do not approve of such conduct by prosecutors, but the letter was written *after* the trial and, therefore, did not affect the result.

influenced. Our review fails to disclose that the jury was motivated by any of these arbitrary influences in fixing O'Dell's punishment at death.

[35] Code § 17-110.1(C)(2) also requires us to determine whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Our comparison of the records of our prior capital murder decisions, accumulated pursuant to Code § 17-110.1(E), convinces us that the sentence in O'Dell's case is not excessive or disproportionate to penalties imposed in similar cases for the reasons which follow.

The murder of Schartner was brutal. Schartner was strangled to death with a force sufficient to break bones in her neck and leave finger imprints on her neck. She was beaten so severely about the head that eight separate marks were left on her skull. A number of other injuries on her body indicated she attempted to ward off blows from a blunt object. The evidence also showed Schartner had been murdered during the commission of, or subsequent to, her rape.

In considering the defendant, we find a lengthy criminal record. O'Dell, born in 1941, began his criminal career at the age of 13 with a juvenile conviction of breaking and entering. During the next three years, he was convicted five times of auto theft.

In 1958, his career escalated to crimes of violence, with three assault convictions that year, as well as a conviction for threatening bodily harm. The following year, O'Dell was convicted of an attempted escape from the penitentiary. Only five months after his discharge from the penitentiary, O'Dell's probation was revoked. He was convicted of five armed robberies and five unauthorized uses of motor vehicles, and sentenced to confinement in the penitentiary for 24 years. While he was in the penitentiary, O'Dell was convicted of second degree murder.

After his parole from the penitentiary in July of 1974, O'Dell went to Florida, where he was convicted of a kidnapping and robbery, which occurred in February of 1975. The victim in that case testified as to the details of her robbery and subsequent abduction, as well as O'Dell's assault upon her in an attempted rape. During that assault, she said O'Dell struck her several times on the head with his gun, choked her, and held a cocked gun to her head in his effort to force her to submit to his sexual advances. The Florida court sentenced O'Dell to a 99-year confinement, but in December of 1983 he was released on parole. Fourteen months after that release, Schartner was murdered.

Because the jury based O'Dell's sentence of death upon his "future dangerousness," we give special attention to our prior decisions in which the death penalty was imposed upon a similar finding of probability that a defendant would be a continuing threat to society. *Peterson v. Commonwealth*, 225 Va. 289, 301, 302 S.E.2d 520, 528, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983). This record equals, and in some cases surpasses, the records in a number of cases in which juries have returned verdicts for the death penalty based on "future dangerousness." *Williams*, 234 Va. 168, 360 S.E.2d 361; *Pope*, 234 Va. 114, 360 S.E.2d 352; *Peterson*, 225 Va. 289, 302 S.E.2d 520; *Russell v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1668, 64 L.Ed.2d 249 (1980).

Taking into account both O'Dell and the crime he perpetrated, and comparing his case with similar cases, we find that juries in this jurisdiction generally fix the death penalty for criminal conduct similar to O'Dell's.

VIII

CONCLUSION

Our review of the record discloses no reversible error. Accordingly, we affirm the judgments of the trial court.

Affirmed.

Keith Allen HARWARD,

v.

COMMONWEALTH of Virginia.

Record No. 0323-86-1.

Court of Appeals of Virginia.

Jan. 19, 1988.

On remand, 229 Va. 363, 330 S.E.2d 89, defendant was convicted in the Circuit Court, City of Newport News, Fred W. Bateman, J., of first-degree murder and he appealed. The Court of Appeals, Coleman, J., held that: (1) opinion evidence from bite mark identification expert witnesses was admissible, and (2) evidence was sufficient to support conviction.

Affirmed.

1. Criminal Law ⇐566, 568

In every criminal prosecution, Commonwealth must establish beyond reasonable doubt all elements of offense and that accused did commit it; evidence must exclude every hypothesis except that accused was criminal agent.

2. Criminal Law ⇐693

To be timely, an objection to admissibility of evidence must be made when occasion arises, that is, when evidence is offered, statement made or ruling given.

3. Criminal Law ⇐1036.1(2), 1044.2(1)

Objection, to ruling in limine that evidence was provisionally admissible, was insufficient to preserve issue of admissibility for appellate review absent contemporaneous objection when evidence was offered; even if pretrial ruling had held evidence inadmissible, counsel was required to make contemporaneous objection when evidence was offered. Sup.Ct.Rules, Rules 5A:9, 5A:18.

4. Criminal Law ⇐1192

Supreme Court's denial of petition for writ of error on assignment of error regarding bite mark identification testimony was tantamount to ruling that such testimony was admissible in case on remand.

5. Criminal Law ⇐867

Witness' mention of previous trial during cross-examination did not warrant mistrial, in homicide prosecution, where nature of comment did not warrant any inference that defendant had been previously convicted and trial court found that comment did not make "any impression whatever on the jury."

6. Homicide ⇐234(6)

First-degree murder conviction was sufficiently supported by identification testimony, including bite mark identification testimony, though much of remaining forensic evidence was inclusive.

Roy H. Lasris (Buxton & Lasris, Yorktown, on brief), for appellant.

Margaret Poles Spencer, Asst. Atty. Gen. (Mary Sue Terry, Atty. Gen., on brief), for appellee.

Present: BAKER, COLEMAN and HODGES, JJ.

COLEMAN, Judge.

This is the second appeal by Keith Allen Harward of successive convictions for the murder of Jesse Perron. The Supreme Court reversed an earlier capital murder conviction in which Harward received a life sentence on the ground that a murderer/rapist could not be found guilty under Code § 18.2-31(a) where the person murdered was other than the rape victim. *Harward v. Commonwealth*, 229 Va. 363, 330 S.E.2d 89 (1985). On remand Harward was convicted by a jury of first degree murder and sentenced to life imprisonment. We review that conviction.

[1] Those facts and procedural history essential to address the issues will be stated. Following established principles, the evidence and all reasonable inferences fairly deducible therefrom will be considered from the viewpoint most favorable to the Commonwealth. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d

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IN THE SUPREME COURT OF VIRGINIA

- X

JOSEPH ROGER O'DELL, III, :

Petitioner-Appellant, :

v. : No.

CHARLES E. THOMPSON, Warden, :
Mecklenburg Correctional Center, :
Boydton, Virginia; EDWARD W. MURRAY, :
Director, Virginia Department of :
Corrections; MARY SUE TERRY, :
Attorney General of the Commonwealth :
of Virginia; and THE COMMONWEALTH OF :
VIRGINIA, :

Respondents-Appellees. :

- X

Assignments of Error

COMES NOW JOSEPH ROGER O'DELL, III, by and through counsel, and respectfully files the following assignments of the errors that occurred during the proceedings that resulted in the dismissal of the petition for a writ of habeus corpus:

I. The Circuit Court erred in holding that Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970), barred claims I, II(B), II(F), III, IV, VII, VIII, IX, X, XII, XIII, XIV, XV, XVI and IX of the Second Amended Petition for a Writ of Habeas Corpus (the "Petition").

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II. The Circuit Court erred in holding that Slayton v. Parrigan, 215 Va. 27, 205 S.E.22d 680 (1974), cert. denied, 419 U.S. 1108 (1975), barred claims II(D), V, VI, X, XI, XIV, XVII and XXII of the Petition.

III. The manner in which the Circuit Court invoked Slayton v. Parrigan and Hawks v. Cox to bar claims in the Petition substantially violated Mr. O'Dell's rights under the Fourteenth Amendment to the United States Constitution and Article I, §§ 8, 9, 11 of the Constitution of the Commonwealth of Virginia.

IV. The Circuit Court substantially violated Mr. O'Dell's rights under U.S. Const. Amend XIV, Article I, §§ 8, 9, 11 of the Commonwealth Constitution, Va. Code § 8.01-654 and the common law of the Commonwealth by entering findings of fact and/or conclusions of law on claims II(C), XVIII, XX, XXI and XXIII of the Petition without holding a plenary hearing.

V. The Circuit Court substantially violated Mr. O'Dell's rights under U.S. Const. Amend XIV, Article I, §§ 8, 9, 11 of the Commonwealth Constitution, Va. Code § 8.01-654 and the common law of the Commonwealth by dismissing claims II(A), II(B)(1), II(B)(3) and II(G) of the Petition without holding a plenary hearing and without entering appropriate findings of fact and conclusions of law.

VI. The findings of fact and conclusions of law of the Circuit Court with respect to claims II(B)(2), II(B)(4), II(E), IV(B) and IX of the Petition are arbitrary, without substantial basis in the evidence and contrary to law.

VII. The Circuit Court erred in not hearing claims I, II(A), II(B)(1), II(B)(3), II(C), II(D), II(F), II(G), III, IV(A), IV(C), IV(D), IV(E), IV(F), IV(G), IV(H), IV(I), V-VIII and X-XXIII on the merits at a plenary hearing and then (a) finding and concluding that Mr. O'Dell is entitled to the relief he seeks, and (b) granting the Petition, issuing a Writ of Habeas Corpus and ordering that Mr. O'Dell's 1986 conviction and sentence be vacated.

Respectfully submitted,

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

NO. 91-5655

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN, ET AL.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

ARE ALL THE PETITIONER'S UNDERLYING HABEAS CLAIMS BARRED BY HIS PROCEDURAL DEFAULT DURING HIS STATE HABEAS PROCEEDINGS?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

NO. 91-5655

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN, ET AL.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On February 5, 1985 the petitioner raped, sodomized and murdered Helen Schartner in Virginia Beach, Virginia. The victim had been strangled manually and also had been struck several times on the head with a pistol. A tire track found at the scene was similar to tires on the petitioner's car. The following day the petitioner arrived exhausted at his former girlfriend's house. Thereafter the girlfriend found clothing soaked in blood in her garage and turned it over to the police. Blood on the clothing was matched with that of the victim using the technique of electrophoresis. The petitioner, while incarcerated, told another inmate that he had in fact committed the murder.

Petitioner was convicted of capital murder on September 10, 1986. Then, in a sentencing hearing before a jury he was sentenced to death on November 13, 1986. His conviction was affirmed by the Virginia Supreme Court in 1988. O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491 (1988). This Court thereafter denied O'Dell's petition for writ of certiorari. 448 U.S. 871 (1988).

A petition for a writ of habeas corpus was filed in the Circuit Court for the City of Virginia Beach in May, 1989. After affording O'Dell a one-day evidentiary hearing, the court dismissed the petition, entering its final order on November 26, 1990.

Thereafter, the Petitioner failed to file a timely Petition for Appeal to the Virginia Supreme Court. On April 1, 1991 the Virginia Supreme Court denied Petitioner's Motion to File a Late Petition. (A95). On that same day the court rejected the proffered petition for appeal for failure to comply with Rule 5:17(a)(1) of the Rules of the Supreme Court of Virginia. That provision requires that an appeal from a trial court be filed within three months of entry of the order appealed from. (A7). On June 7,1991 the Court denied a Petition for Rehearing of that Denial. (A97).

REASON WHY THE PETITION SHOULD BE DENIED

The State Procedural Bar Applied In This Case Has Been Upheld Recently By This Court

Petitioner concedes that "a question of federal law dismissed by a state court judgment pursuant to independent and adequate state rule of procedure forecloses this Court's ability to review the federal question." (Petition 42). This concession, however, was mandated by this Court's recent decision in Coleman v. Thompson, 111 S.Ct. 2546 (1991). Coleman clearly controls this case and all of O'Dell's claims are barred from federal review by his failure to perfect a timely state habeas appeal.

The claim that the Virginia Supreme Court's dismissal of O'Dell's petition for appeal was not independent of federal law is meritless. Upon discovery of his error in failing to file a timely petition for appeal, petitioner filed a motion in the Virginia Supreme Court asking for permission to file a late petition or to supplement the "assignments of error" he had previously filed. There is absolutely no reason to believe that the Virginia Supreme Court made any "antecedent ruling on federal law" in denying the motion and enforcing its procedural bars. The dismissal was based on the clear and explicit statement in Rule 5:17(a) of the Rules of the Supreme Court of Virginia that the petition must be filed within three months of the entry of judgment. (A7). Under Rule 5:5(a) "the times prescribed for filing...a petition for appeal (Rules 5:17(a)...)...are mandatory." (See copy attached hereto).

The mere fact that O'Dell failed to file a timely petition for appeal, as opposed to a late notice of appeal, does not distinguish this case from Coleman. It is true that this Court pointed out that Commonwealth's reliance on Tharp v. Commonwealth, 211 Va. 1, 3, 175 S.E.2d 277, 278 (1970) because his case involved a notice of appeal rather than a petition. 111 S.Ct. at 2561. This Court also stated, however, that Tharp did not stand for the principle that the Virginia Supreme Court "will conduct at least a cursory review of a petitioner's constitutional claims on the merits before dismissing an appeal." 111 S.Ct. at 2560. This Court stated that "[a] more natural reading is that the Virginia Supreme Court will only grant an extension of time if the denial itself would abridge a constitutional right. That is, the Virginia Supreme Court will extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard." 111 S.Ct. at 2560 (emphasis added).

Here, the Virginia Supreme Court's denial of O'Dell's request for an extension of time to file a petition appeal did not in any way violate the petitioner's constitutional rights. A prisoner has no constitutional rights to state habeas proceedings and no right to the effective assistance of counsel if such proceedings are afforded by the state. Pennsylvania v. Finley, 481 U.S. 551, 556-557 (1987).

Petitioner's inability to follow the Rules of the Virginia Supreme Court does not warrant certiorari review of the Virginia Supreme Court's dismissal order, which was clearly based on an adequate and sufficient state ground. Since the instant proceeding is a direct review of the Virginia Supreme Court's judgment, this Court is without jurisdiction to review O'Dell's habeas claims.

CONCLUSION

The petitioner has failed to demonstrate "any special or important" why this case should be reviewed on certiorari. U.S.S.Ct.R. 10. For this reason, the petition should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

NO. 91-5655

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN, ET AL.,

Respondents.

CERTIFICATE OF SERVICE

I, Eugene Murphy, a member of the bar of this Court, hereby certify that on this ___ day of September, 1991, a copy of the foregoing respondents' brief in opposition was mailed to Robert S. Smith, Esquire, 1285 Avenue of the Americas, New York, New York 10019-6064, counsel for petitioner. I further certify that all parties required to be served have been served.

Eugene Murphy
Assistant Attorney General

Rule 5:5. Extension of Time; Filing by Mail.

(a) The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), the transcript or written statement (Rule 5:11), a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rules 5:20 and 5:39), are mandatory. The time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1 or a petition for rehearing is filed in the Court of Appeals. In any such case the time for filing shall be computed from the date of final judgment entered following such modification, vacation, or suspension, or from the date the Court of Appeals refuses a petition for rehearing or enters final judgment following the granting of such a petition.

(b) Any document required to be filed with the clerk of this Court, or filed in the office of the clerk of this Court, shall be deemed to be timely filed if it is mailed postage prepaid to the clerk of this Court by registered or certified mail and if the official receipt therefor be exhibited upon demand of the clerk or any party and it shows mailing within the prescribed time limits. This rule does not apply to documents to be filed in the office of the clerk of the trial court or clerk of the Industrial Commission or clerk of the State Corporation Commission.

SUPREME COURT OF THE UNITED STATES

JOSEPH ROGER O'DELL *v.* CHARLES THOMPSON, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 91–5655. Decided December 2, 1991

The petition for a writ of certiorari is denied.

Statement of JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, respecting the denial of the petition for writ of certiorari.

This is a capital case. Since the present Term began on October 7, 1991, the Court has considered 102 capital petitions, each seeking review of a decision of a State's highest court. Even if practical considerations did not preclude review on the merits of all such petitions, another consideration often argues against granting certiorari: in many of these cases, a federal habeas proceeding is necessary to develop further the petitioner's claims, both factually and legally. This is one such case. Because I believe the evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself, I write to underscore the importance of affording petitioner meaningful federal habeas review.

On February 5, 1985, a woman was murdered in a field behind the After Midnight Club in Virginia Beach, Va. Petitioner O'Dell had been at that bar during the evening. There was no evidence that he previously had known the woman or that they had spoken or departed together. O'Dell left the bar some time after the victim did and went to another bar where he got into a fight. The following day, O'Dell arrived at his former girlfriend's house. Thereafter, the former girlfriend found blood-stained clothing in her garage and turned it over to the police. O'Dell was charged

with murder.

Shortly before the trial, the court excused O'Dell's public defender because of an unspecified conflict. A new attorney was appointed, but O'Dell sought permission to proceed *pro se* after the attorney acquiesced in the Commonwealth's motion to have O'Dell examined by a court-appointed psychiatrist.[1] Following his examination by a local psychiatrist, the court found O'Dell competent to proceed *pro se* and ordered the attorney to act as standby counsel. Several times during the trial, the judge commented on O'Dell's inability to "emotionally control" himself, see, *e. g.*, Tr., vol. 22, p. 44, and on one occasion informed O'Dell that his outbursts "concern me as to whether you are in fact in need of a reevaluation." *Id.*, vol. 23, p. 21. Despite entreaties by standby counsel, the court refused to order a reevaluation.

The Commonwealth's evidence at trial consisted of tire tracks that were "similar" to those left by petitioner's car, blood tests, and testimony by a fellow inmate that O'Dell had confessed to committing the murder. The court refused O'Dell's request for a hearing on the reliability of the blood tests and allowed the technician to opine that the blood samples taken from O'Dell's shirt and jacket were consistent with samples taken from the victim. The court also denied O'Dell's proffer of evidence that the informant had offered to manufacture evidence in other trials as a means of avoiding prison terms.[2] O'Dell was convicted and sentenced to death. The conviction and sentence were upheld on appeal.

O'Dell continued to maintain his innocence during state habeas proceedings. He introduced the results of DNA testing that demonstrated that the blood found on his shirt either was not the victim's or could not reliably be linked to the victim. O'Dell also argued that the trial court erred in

[1] O'Dell previously had been diagnosed as a paranoid schizophrenic and had engaged in erratic behavior prior to trial.

[2] Subsequent to O'Dell's trial, the informant was given three years' probation on a breaking and entering charge, despite contrary assurances by the prosecution to petitioner's counsel and the court.

allowing him to represent himself, given his history of mental illness and his behavior at trial. See *Faretta* v. *California*, 422 U. S. 806 (1975); *Drope* v. *Missouri*, 420 U. S. 162, 181 (1975). The Virginia Circuit Court denied state habeas relief, specifically holding that the fact that current testing methods would have produced a different result does not justify the issuance of a writ of habeas corpus. The state court also ruled that O'Dell had been competent to represent himself.[3]

Following the denial of state habeas relief by the Virginia Circuit Court, O'Dell filed a timely notice of appeal with the Virginia Supreme Court. Having interpreted the relevant subsection of the Virginia Code as providing for an appeal as of right, O'Dell's counsel then filed timely assignments of error.[4] On March 6, 1991, a week after the filing deadline, the deputy clerk of the Virginia Supreme Court and the attorney for the Commonwealth informed

[3] Petitioner raised a number of other substantial federal claims, including a challenge to remarks made in the prosecutor's closing argument that petitioner previously had violated his parole. Standby counsel had complained to the trial court that the argument was made in such a way as to convince the jury that it had only two options: either sentence petitioner to death or turn him loose on the streets to kill again. In fact, petitioner could receive only the death sentence or life without parole. The trial court refused petitioner's request for a curative instruction or a chance to rebut the prosecutor's misleading statements. In his state habeas proceedings, petitioner argued that the trial court had violated *Gardner* v. *Florida*, 430 U. S. 349 (1977), which held that a defendant is denied due process of law when his death sentence is imposed, at least in part, on the basis of information that he had no opportunity to deny or explain. The Virginia Circuit Court held that this challenge was barred by res judicata under *Hawks* v. *Cox*, 211 Va. 91, 175 S. E. 2d 271 (1970).

[4] A Virginia statute provides that a habeas decision in a capital case is appealable directly to the Virginia Supreme Court. See Va. Code §17–116.05:1(B) (1988); *Hill* v. *Commonwealth*, 8 Va. App. 60, 69, 379 S. E. 2d 134, 139 (1989). The wording of this statute—"appeals lie directly to the Supreme Court"—suggests an appeal as of right, rather than a discretionary petition for appeal. The other categories of cases listed in this subsection require the filing of assignments of error, not a petition for appeal.

petitioner's counsel that, in their opinion, O'Dell did not have an appeal as of right and thus O'Dell also needed to file a petition for appeal. At the same time, the Commonwealth's attorney allegedly informed petitioner's counsel that he would not oppose O'Dell's supplementation of his filings with the additional document. Two days later, however, when O'Dell filed a motion to perfect his appeal, the Commonwealth opposed the motion. On March 15, O'Dell filed his petition for appeal. On April 1, the Virginia Supreme Court denied O'Dell's motion and rejected his appeal. The Commonwealth now argues that the Virginia Supreme Court's rejection of O'Dell's appeal bars review of the merits of the federal questions raised by O'Dell in the Commonwealth's courts.

The Virginia Supreme Court's dismissal of O'Dell's habeas petition should not deprive a federal habeas court of jurisdiction. Under *Ake* v. *Oklahoma*, 470 U. S. 68, 74–75 (1985), the Virginia Supreme Court's rejection may not be based on an independent state ground because *Tharp* v. *Commonwealth*, 211 Va. 1, 175 S. E. 2d 277 (1970), requires the Virginia Supreme Court to consider whether a constitutional right was abridged before denying an extension of time for filing a petition for appeal.[5] The Virginia Supreme Court's rejection of O'Dell's appeal may also be an inadequate state ground. In *James* v. *Kentucky*, 466 U. S. 341 (1984), this Court held that only firmly established state procedural rules interpose a bar to the adjudication of federal constitutional claims. The ambiguity of the Virginia statute, Va. Code §17–116.05:1B (1988), as to whether

[5] While this Court rejected a similar argument in *Coleman* v. *Thompson*, 501 U. S. ___, ___ (1991) (slip op. 17), this case may be distinguishable. *Coleman* dealt with an untimely *notice* of appeal, not an untimely *petition* for appeal. Since the notice and assignments were timely, the Commonwealth was not unaware of petitioner's arguments, as it arguably was in *Coleman*. The Commonwealth's initial willingness to extend petitioner's time to perfect his appeal provides additional evidence that Virginia can waive the untimeliness rule when fundamental constitutional issues are at stake.

capital appeals are discretionary or as of right may preclude its use as a procedural bar.[6] See also *Ford* v. *Georgia*, 498 U. S. ___ (1991) (state practice must be firmly established and regularly followed in order to prevent subsequent review by this Court); *NAACP* v. *Alabama*, 377 U. S. 288, 297 (1964) (application of procedural rule was pointless, severe, and consequently inadequate as jurisdictional bar to review).

Finally, federal review of O'Dell's claims is possible if it is necessary to prevent a fundamental miscarriage of justice, see *Coleman* v. *Thompson*, 501 U. S., at ___ (slip op. 31), or if the constitutional violation caused the conviction of an innocent person. See *McCleskey* v. *Zant*, 499 U. S. ___, ___ (slip op. 34) (1991).

In short, there are serious questions as to whether O'Dell committed the crime or was capable of representing himself—questions rendered all the more serious by the fact that O'Dell's life depends upon their answers. Because of the gross injustice that would result if an innocent man were sentenced to death, O'Dell's substantial federal claims can, and should, receive careful consideration from the federal court with habeas corpus jurisdiction over the case.

[6] As has been noted, see n. 4, *supra*, the wording of this statute—"appeals lie directly to the Supreme Court"—suggests an appeal as of right, rather than a discretionary petition for appeal. According to petitioner's counsel, even the clerk's office and the Commonwealth's attorney were uncertain as to whether petitioner was entitled to an appeal as of right.